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POLITICAL SCIENCE QUARTERLY.

RAILWAY TARIFFS AND THE INTERSTATE COMMERCE LAW. II.

SCARCELY second in importance to the short-haul clause of the national law, which has been discussed in the preceding essay,[1] is the section which prohibits pooling. What is the true significance of pooling? What will be the effect of the law? To give a correct answer we must enter upon a consideration of competition in general.

And here we are immediately confronted by the two fundamental questions: Is free competition universally beneficent? Is free competition universally existent?

The doctrine of free competition is essentially a modern idea.

[1] POLITICAL SCIENCE QUARTERLY, June, 1887, p. 223. It has been a source of great satisfaction to me that the Interstate Commerce commission in its recent weighty decision has taken substantially the same ground as that occupied in my first article. The chief points are as follows:

"*First.* That the prohibition in the fourth section against a greater charge for a shorter than for a longer distance . . . is limited to cases in which the circumstances and conditions are substantially similar.

"*Third.* That . . . in case of complaint for violating the fourth section the burden of proof is on the carrier.

"*Fifth.* That the existence of actual competition . . . may make out the dissimilar circumstances and conditions . . . in the following cases:

1. When the competition is with carriers by water which are not subject to the provisions of the statute.

2. When the competition is with foreign or other railroads which are not subject to the provisions of the statute.

3. In rare and peculiar cases of competition between railroads which are subject to the statute, where a strict application of the general rule of the statute would be destructive of legitimate competition.

"*Sixth.* . . . The fact that long-haul traffic will only bear certain rates is no reason for carrying it for less than cost at the expense of other traffic."—*In re* The Louisville & Nashville R.R. Co. *et al.*, pp. 27–29.

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As the basis of nineteenth century economics it was first formulated by the Physiocrats and Adam Smith. It is entirely foreign to ancient and mediæval conceptions. The economy of the middle ages was founded on the idea of reasonable, customary price — the *justum pretium* of the legists, theologians, and statesmen. The institutions were based on restrictions, privileges, and enforced monopolies, while the legislative prohibitions were not entirely the product of class selfishness but in part the recognized expression of an attempt to secure distributive justice. That the legislators finally overreached themselves and stifled all liberty by their multifarious restrictions is a well-known fact. The necessary and salutary reaction found its theoretic justification in the "natural law" tenets of the eighteenth century, and a partial realization of those tenets followed in the first half of the nineteenth century. The idea now became current that a reign of free competition and its logical correlative, absolute *laissez faire*, would bring about a harmony of interests, a state of universal bliss. The enthusiasm of Bastiat and McCulloch was natural in seeing the world break away from the shackles of mediæval restraint. But recent experience has demonstrated the falsity of their anticipations and has disclosed serious defects in the *régime* of free competition. It does not always work evenly; it often secures undue advantages to the unscrupulous; it has given birth to great abuses in the factory system and the fraudulent speculation of modern society. The law of competition is not always beneficent.

Furthermore, it does not exist universally. The doctrine depends on the postulates of absolute transferability of labor and capital. But this assumption is approximately true in only a few instances, absolutely untrue in many instances. In the industrial undertakings of the present day the capital invested is often fixed, not circulating, capital, and cannot easily be transferred to a more lucrative business. It is difficult to gauge even approximately the superior profitableness of some competitive enterprise; and even when it has been gauged, it is still more difficult at once to transfer the capital. In fact, in only one department of business life does the doctrine of the absolute

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play of free competition hold good — in the stock exchange of modern times.[1]

John Stuart Mill long ago called attention to what we may term economic or industrial monopolies, where competition is neither illegal nor absolutely shut out by nature, but where it is shown to be practically undesirable and utterly inefficient, thus of itself giving place to some form of monopoly.[2] Other writers, and especially Farrer,[3] have attempted to analyze these phenomena and show why the law of competition is not applicable. Certain characteristics are common to them all. The industry demands a large amount of capital; it supplies a necessary of life; the article furnished is local; the industry occupies a peculiarly favored situation; the method of operation requires unity and harmony of management; the production can be largely increased without a proportionate increase of capital. This is true not only of docks, waterworks, and gasworks, but of all media of transportation — turnpikes, canals, telegraph, post, and railways. In some of these competition has never been attempted; in most cases it has been tried, but has miserably failed. The disappearance of competition has benefited the companies and in many instances also the public. But at all events, whether beneficial or not, competition has disappeared, and combination and monopoly have resulted.

The chief consideration is the possibility of increased production without proportionate increase of plant or capital. To use a happy phrase, the business is subject to the law of increasing returns.[4] The traffic on a railroad may be doubled without the necessity of duplicating roadbed, track, terminals, and general expenses. Ten lines between New York and Albany would not benefit the public, and would certainly ruin

[1] This explains, as Cohn pointed out, why Ricardo, who was a stock-exchange broker, first successfully elaborated the theory of free competition. Untersuchungen über die englische Eisenbahnpolitik, Bd. II (1875), S. 384.

[2] Book v, ch. xi, § 11; Appleton's ed. 1880, vol. ii, p. 584.

[3] *Cf.* Industrial Monopolies, *Quarterly Review*, October, 1870. Also Sax, Die Verkehrsmittel, Bd. I, S. 66 *et seq.*, and Simon Sterne, Monopolies, Lalor's Cyclopædia of Political Science, vol. ii.

[4] H. C. Adams, Relation of the State to Industrial Action, Publications of the American Economic Association, vol. 2 (1887), p. 523.

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each other. One line judiciously managed can perform all the work at far less cost. The railway is an economic monopoly; the inevitable tendency is toward fusion and single-headed management.

In addition to these economic monopolies proper, we find almost every department of wholesale trade at present taking the form of industrial combination. To maintain that prices are everywhere regulated by the free play of competition is no longer permissible. We cannot ignore the fact that producers find it to their interest to combine and agree on certain prices less than which it shall be unlawful to ask or take. Adam Smith already said: "People of the same trade hardly meet together even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." Even then the movement had begun; to-day it has become well-nigh universal. There is scarcely a trade throughout the land without its combinations, — many of which in the last few months have taken the impalpable form of trusts, in the endeavor to attain corporate advantages without assuming corporate responsibilities. There are really four classes: combinations to limit production, to regulate prices, to regulate distribution, to divide the field. Some comprise all four characteristics. To describe or enumerate them is needless in view of the recent discussions to which they have been subjected.[1] But the facts exist. Prices are no longer determined by the action of free competition, but by the artificial manipulation of these industrial combinations or partial monopolies.

Are these combinations now a necessary evil? Are they an evil at all? Here it will be necessary to revise our natural opinion that monopoly is always injurious. This is as great a mistake as to affirm that competition is always beneficent. The characteristic feature of modern economy is that articles are produced not to satisfy any particular demand, but for the world

[1] *Cf.* J. B. Clark, Limits of Competition, and F. H. Giddings, Persistence of Competition, POLITICAL SCIENCE QUARTERLY, March, 1887, pp. 45, 62. Also the articles of H. D. Lloyd, *North American Review*, 1884 and 1885. For Europe, see Kleinwächter, Die Kartelle (1883). For England, Select Committee on Railways (1882), Evid. qu. 3893; (1881), Evid. qu. 16,376.

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market. Unregulated production, production uncontrolled by the state of the market, overproduction or mistaken production have brought about the modern commercial crises. A period of large profits alternating with a period of large losses, extremely low prices alternating with extremely high prices, — this has been the history of modern industry. It is a period of industrial anarchy.

Combinations are designed to put an end to this anarchy. They do away with the excessive fluctuations of prices, performing much the same function as legitimate speculation. Of course, in most cases, they have only their own profits in view; but is it true, as Adam Smith thought, that they are always a conspiracy against the public? A careful analysis must lead us to answer no. They better their own condition, but in so doing they often better the public condition. Steadiness of price is better than fitful fluctuations in price; regulation of production is better than the underproduction or overproduction which results in crises; combination is preferable to "cut-throat" competition which ruins the producer without benefiting the public.

It is of course undeniable that there are possible or actual abuses connected with these combinations. But from this simply results the necessity of public control. We have the alternative: Leave the combinations alone or regulate them. There is no third method. We may prohibit them, but we cannot prevent them. If we make them illegal, we shall simply make them secret. We cannot prevent two men from agreeing not to compete with each other. Robert Stephenson truly said, in 1853: "Where combination is possible, competition is impossible."[1] The whole trend of modern development is to substitute the large for the small, to put combination in the place of competition. We cannot stop the progress; we must recognize it.

The question thus arises: Shall we allow these associations

[1] This phrase was not coined by George Stephenson, as Hadley, Railroad Transportation, p. 66, erroneously asserts, but by his son Robert. *Cf.* Report Select Committee on Railway and Canal Bills (1853), Evid. qu. 885, 886, p. 92. This is a mistake almost universally made.

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to develop as they will, or is it the duty of the public to interpose its authority and to regulate what it cannot prevent? Put in these words, the answer seems plain. We must recognize the monopolies as existing facts but hold them under control. We have in general gone on the opposite theory. We have believed in the universal existence and beneficence of free competion; we have wilfully blinded our eyes to what was taking place about us; and to-day we wake up only to recognize the existence of these gigantic combinations. To legislate against them and fall back again on the specific of free competition would be absolutely futile. Competition has had its day and has proved ineffective. Let us be bold enough to look the facts straight in the face and not shrink from the logical conclusions of our premises. Recognize the combinations but regulate them.

The application of all this to railways is plain. As a regulator of charges, competition between railways is even less effective than in other large occupations. The doctrine of transferability of capital, partially true elsewhere, is absolutely false here. The railway possesses all the elements of a practical monopoly. So obvious are the advantages of agreement and fusion, that whenever a railway system has started out with competition of independent lines it has inevitably resulted in some form of combination. The public has profited no less than the companies. The curse of free trade in railways has been the system of parallel and often needless lines. An additional road between two terminal points frequently represents so much wasted capital, and the necessity of earning profits on this swollen capital simply aggravates the burden on the public. No more serious blunder has been made than to suppose that increased competition means increased facilities and lower charges. The competition, while it lasts, is of a desperate character, and each line strains itself to the utmost to obtain the business which is only sufficient for one. Charges indeed may be lowered temporarily, but the strenuous attempt to procure the traffic gives birth to the very worst abuses of railway management — secret personal discriminations and im-

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moderate local discriminations. The changes are violent, the conditions unstable. Reduction of rates is sometimes carried to such a point that not even operating expenses are met, for the reckless and bankrupt roads feel no need of earning any fixed charges. The railway wars, which are the logical and extreme manifestations of railway competition, thus exhaust the companies and afford but a dubious relief to the public. Lowness of charges is outweighed by the instability of charges. And the reduction itself is necessarily of an ephemeral character. Continuance of the rates means universal bankruptcy; escape from ruin is possible only through combination. The combination which results again raises rates, and the charges must now be sufficient to earn profits on the often increased capital of the two lines. If competition be beneficial to the public, it is a very temporary benefit; if railway wars, on the other hand, throw all trade into confusion and engender the most aggravated abuses, then the cessation of the competition is a boon to the public, even though the combination results in a relative increase of charges. And if this be true, then a railway policy which obviates the danger of railway wars and "cut-throat" competition can give the public not only stability of rates but also the additional advantage of relatively lower charges.

However the railways start out, they are sure to end in combination. It is the same development as in all other economic monopolies, with the sole difference that the railway monopoly is more pronounced and the railway combinations more widespread. In no business are the effects of spasmodic competition more pernicious. It needs but slight acquaintance with the practical construction of railway rates to perceive the absolute interdependence of tariffs. A war between two important lines necessarily involves the interests of distant roads throughout the country. The only escape from ruin is the replacement of competition by some form of combination. No less than seven possible forms of arrangement have been successively tried: 1. Agreement to make equal rates or give equal facilities as to speed, accommodation, *etc.* 2. Agreement to forward traffic over each other's lines by working arrangements or traffic facili-

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ties. 3. Agreement to divide the field. 4. Agreement to divide the earnings. 5. Agreement to divide the traffic. 6. Agreement to lease. 7. Agreement to consolidate. Each successive arrangement presents more chances of stability and permanence than its predecessor.

The first two methods have their home principally in England, although they are characteristic of all early attempts to avert competition. Not only do the railways agree as to the charges, but also as to the speed and accommodations. Contracts to run an equal number of trains at the same speed and with similar facilities are extremely common. For a long time reliance was placed on the existence of competition, but at present both railway officials and railway antagonists have definitely abandoned all faith in its efficacy.[1] Agreements as to rates, speed, and accommodation are to-day the well-nigh universal rule.

It is plain, however, that new agreements to maintain rates or afford facilities are difficult to enforce in the face of serious temptation to cut rates or underbid a rival company. The difficulty grows in proportion to the number of originally competitive lines. Hence in the United States, where the facility of constructing new competitive roads is practically unlimited, these methods, although often tried,[2] have proved ineffectual to prevent railway wars with the consequent abuses of fluctuations and injustice to the public. It was necessary to devise some other escape from competition.

The third method, that of division of the field, was naturally impracticable as long as any such plan might immediately be frustrated by the construction of a new line to invade the field. Some countries indeed, which foresaw the weakness of competition from the very outset, adopted this method, technically

[1] Report Select Committee on Railways (1882), Evid. qu. 2964 (Brown): "The days of competition are gone with railway companies." *Ibid.*, qu. 3896: "It cannot be to the interest of [the railways or] the public to carry on such competitive traffic, as they must either agree or stop ultimately." *Cf.* as to non-competition in accomodations, *etc.*, Joint Select Committee of 1872, Evid. (Farrer) qu. 7623, (Tyler) qu. 6893, 6914, (Wright) qu. 2548, (Scott) qu. 5384, *etc.*

[2] The arrangement made by the Saratoga conference of 1874 is the first example of such an agreement between the trunk lines. As to Western agreements between "honorable" roads at present, *cf.* Cullom Committee Rep., Test., p. 728.

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called the principle of territorialization. Thus France parcelled out her territory among a small number of railways, principally radiating from Paris as a centre. The six "great companies" which control the transportation facilities are the direct product of the governmental policy. To use Mr. Chadwick's phrase, it is a system of competition *for* the field, not of competition *in* the field,[1] *i.e.* the stage of competition is removed to the period anterior to construction. In other words, the charters were granted to the highest bidders, to those companies which agreed to the conditions most favorable for the state. But this system proved defective in a double manner. In the first place, the rivalry between the corporations to obtain the coveted charters resulted in the assumption, by the successful competitors, of such unduly heavy burdens that after a short time they were confronted by the prospect of speedy ruin, until the state was compelled to interfere and lighten the burdens, thus abandoning the advantages that had been secured. In the second place, the almost absolute immunity from competition by new lines rendered the railways careless and averse to undertake improvements. While the French system, therefore, avoided in great measure railway wars and personal discriminations, it gave rise to serious complaints of extortionate charges and insufficient facilities — complaints which the recent agreements between the railways and the state are attempting to remedy.[2]

In those countries, however, where the original policy was that of unrestricted competition, the trend toward combination has also taken this form of territorialization. In England it is known as the districting system or district amalgamation, the chief examples being those of the North Eastern and Great Eastern railway companies.[3] The project has often been broached of enforcing a more systematic districting in the future; but the select committee of 1872 showed that such

[1] Chadwick, Results of different Principles of Legislation and Administration in Europe, *Journal of the Statistical Society*, vol. 22 (1859), pp. 381–420, esp. p. 385.

[2] Thoviste, Étude sur les conventions financières conclues entre l'État et les compagnies de chemins de fer (1886), pp. 121–124, 164–170.

[3] Joint Select Committee of 1872 on Railway Companies' Amalgamation, Evid. qu. 3660 *et seq.*

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a plan was still impracticable, and enlarged on the inexpediency of conceding a full legal monopoly to the "districted" combinations.[1] In the United States there have been sporadic examples of the division of the field, where the separate parties to the combination agreed not to trench upon each other's territory; but the immense number of competitive lines has rendered arrangements of this kind for the most part illusory.

The next and most common step in the development of combination is the growth of the fourth and fifth forms — division of the traffic or the earnings. These are technically known as pools, — traffic pools and money pools,[2] — and it is against them that the fulminations of the Interstate Commerce law are directed. There is, perhaps, no single institution more commonly or more grievously misunderstood. For the odium that it has incurred the name itself is in part responsible. "Pooling" savors of a gambling transaction, of a wager or speculation; it immediately recalls to mind the "blind pools" of Wall Street notoriety, the accompaniments of games of chance. But railway pools are of an entirely different nature.[3] They are simply an attempt to escape the evils of an unrestricted competition while retaining all its essential advantages.

The first great benefit of all pooling machinery is a greater stability of charges. Continual and sudden fluctuations in rates are regarded by shippers as even worse than extortionate rates. Momentary and unexpected changes throw all business into confusion. Yet before the formation of pools these fluctuations were enormous. Let us take as an example the traffic between Chicago and New York, which received an immense impetus several years after the close of the war and the formation of the trunk lines. In 1869 the through tariffs from New York to Chicago changed twenty times during the year; in 1870, eleven times; in 1871, nine times; in 1875, five

[1] Report, pp. xl-xlii. *Cf.* Evid. (Farrer) qu. 7679, (Price) qu. 3815, *etc.*

[2] Or "cash" pools.

[3] *Cf.* in general, Cooley, Popular and Legal Aspects of Traffic-pooling (1884); Simon Sterne, Railroad Poolings and Discriminations (1879); Blanchard, Traffic Unity (1884); Pierson, The Passenger Pool (1884); Fink, The Railroad Problem and its Solution (1880).

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times.[1] Not a year passed without frequent and often enormous fluctuations; *e. g.*, sudden changes from $1.88 to 40 cents per hundred and then back again. Yet after the formation of the trunk line pools of 1877–8, which were subsequently strengthened by the joint executive committee of 1879, there were for more than three and a half years *no* changes at all.[2] The manifest gain to the public in this increased steadiness of rates needs no further elucidation. Without the machinery devised for the Southern Railway and Steamship association in 1875 by Mr. Albert Fink, and extended by him to the trunk lines in 1877, this stability of rates would have been infinitely more difficult of accomplishment.

Secondly, not only do the pools succeed in obtaining a greater stability of the published tariffs, but they also tend to maintain actual charges to the level of the published tariffs by abating "rate-cutting," whether secret or open. It is conceded that personal discriminations or preferential rates form the chief abuse of our railway management. These special favors may indeed be cloaked under a variety of disguises, — such as underweighing or underbilling, Christmas gifts, and other arrangements whose exact tenor is known only to the freight manager and the individual shipper, — for the forms of personal preferences are limited only by the ingenuity of the railway officials. But secret rebates of this kind cannot be entirely prevented by any method, whether legal prohibition or voluntary agreement, as long as they remain secret. The sole remedy lies in absolute publicity and in removing as much as possible the temptation to cut rates. This the pooling system accomplishes with a fair degree of success, since the earnings of the railways are divided in fixed proportions irrespective of the traffic actually carried. The more effectual the pool and the more stringent the penalties

[1] Fink, Statistics regarding the Movement of Eastbound and Westbound Traffic over the Trunk Lines and connecting roads (1884), p. 39, comprising all changes from 1862 to 1884.

[2] From Feb. 15, 1878, to Aug. 6, 1881. Hudson, The Railways and the Public, p. 218, does not allude to these facts. His exposition is worse than inaccurate. It is so misleading as to be positively mischievous.

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for infraction of the agreement, the greater the chances for maintenance of rates.

To object to pools because they have not completely attained their object — that of maintaining rates — is an argument of but little cogency. The most candid observers, even among those who at the outset opposed all forms of monopoly, admit that the situation has been materially improved since the existence of railway pools.[1] Such gross and palpable discriminations as those which built up the Standard Oil company would have been impossible under the late system of complete trunk line pools.[2] Preferential rates to-day in the district covered by the pooling systems are immeasurably less, both in number and extent, than ten years ago. The pressure exerted upon recalcitrant members is always stronger in a pool than in a mere agreement to maintain rates. If pools have not been entirely successful in preventing discriminations and railway wars, it is owing solely to lack of sufficiently coercive powers in the executive as well as to the fact that the pools are to a great extent beyond the law. The non-maintenance of rates is a violation of the pool, not a result of the pool. But if it be granted that pools do exert a beneficial influence in preventing preferential rates, then the surest method of augmenting this influence lies in strengthening the pools with their compulsory powers, not in abrogating them. The railway officials themselves have finally become conscious of this truth, and during the past few years we have had the singular spectacle of railway magnates demanding governmental interference with the railways in order to legalize, enforce, and regulate the pooling contracts. That such a step would be advantageous to the corporations is now substantially admitted; that it would be no less advantageous to the public is a fact which is only beginning to dawn on the public mind.[3]

[1] *Cf.* Simon Sterne, The Railway Question (1885), pp. 22–27, and in Cullom Report Test., pp. 71–77, as compared with his views in Report on the Internal Commerce of the United States (1879).

[2] United States Senate Committee on Labor and Education (1883), Test., vol. ii, p. 517.

[3] A fact obscured by such thoroughly partisan and unscientific works as that of Mr. Hudson.

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The early pools were mainly "money pools." Thus the Chicago and Omaha pool of 1870 was based simply on the principle of a division of the total earnings after the deduction of a fixed percentage retained by each of the three roads as representing its expenses. But this arrangement was a manifest temptation to the individual lines to cut rates, increase the competitive business, and thus deduct a larger share to cover the increased expenses. Hence in 1874 the arrangement was modified so as to no longer allow deductions for expenses. The combination thus became, with a few minor exceptions, a "gross money" pool instead of a "net money" pool.[1] In the Southern Railway and Steamship association of 1875 the pooling policy was only one of the features of the combination, it being in other respects a forerunner of the "traffic associations," whose object is to facilitate the transaction of business, to provide proper means of amicably adjusting all differences, and to collectively and promptly enforce all agreements. Pools and traffic associations are of course entirely independent of each other; a pooling arrangement may be, and frequently is, one of the features of the traffic association, but there is no necessary connection between them. The one may and does exist without the other. In the association devised by Mr. Fink, with its elaborate machinery of executive officers, general commissioner, board of arbitration, *etc.*, the word pool is not mentioned at all. It was simply an attempt to substitute organized and harmonious action for the chaotic confusion and internecine rivalry between the southern railways.[2] Pooling arrangements were subsequently adopted, but only as a subordinate and entirely incidental feature of the general project. The contract provided for a net money pool, but with a comparatively small deduction for expenses.[3] The supplementary agreement of 1877 sought to increase the cohesiveness of the pool by providing for a penalty fund[4]

[1] Report on the Internal Commerce of the United States (1879).

[2] Proceedings of the Convention of the Southern Railway and Steamship Assoc. at Atlanta, Ga., Sept. 16, 17, 1875, pp. 11–17 (letter of Fink), 1–9 (agreement).

[3] Report on Internal Commerce of the United States (1876). Part II contains a reprint of the agreements.

[4] 20 per cent of the amount received on all joint business transacted.

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deposited by each road with the commissioner as a pledge of good faith, and forfeitable upon proven infraction of the agreement.

When the Westbound Trunk Line pool was formed by Mr. Fink in 1877 after a protracted and desperate war. the policy of dividing the business instead of the earnings was carried into effect. It was a "traffic pool" instead of a money pool, and was further developed in the joint executive agreement of 1879. The joint agent was invested with the duty of making the weekly accounts and of specifying the roads which had carried less than their agreed percentage; and such roads were bound to promptly restore the balance by removing from the other companies their excess.[1] This was known as the "equalizing of freight" or "diversion of traffic." In the new agreement of 1882 the payment of money balances or settlements in net earnings was introduced, and for two years no transfers of tonnage were made.[2] But to some extent the practice re-appeared, and caused so much dissatisfaction among the shippers that in the agreement of 1885 it was definitely discarded and provision made for the prompt payment of money balances by preliminary deposits to the credit of certain trustees.[3] Since October, 1884, settlements moreover were made in gross, not net earnings. In the division of the eastbound dead freight and live stock traffic, as well as among the other associations throughout the country, this method of settlement had become the general rule. So accurately were the percentages allotted, that the amount of money balances was phenomenally small, in some cases amounting to less than one per mill of the gross revenue.[4] This is a fact commonly overlooked, but which reflects the greatest possible credit on the organizers of the traffic arrangements.

[1] *Cf.* the contract in Hepburn Committee Report, Exhibits, p. 63.

[2] *Cf.* statistics in Fink, Letter in relation to the Diversion of Freight, Exhibit No. 3, Third Report of Board of Railroad Commissioners of New York (1885), p. 120.

[3] Contract between the trunk lines, Nov. 6, 1885, arts. x–xiii; reprinted in Cullom Com. Rep., App., pp. 237–244.

[4] In the Southern Railway and Steamship Association from 1876 to 1886, gross earnings were $82,000,000; total money balances, $461,295, or 0.56 per cent. The

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The idea that pools are a product of American ingenuity is most erroneous. The present form of railway federation or traffic association is indeed peculiar to America, and represents the life-long work of Albert Fink, but the pooling arrangements are only ancillary features. Pools are not new. Europe learned the futility and inexpediency of opposing pools many years ago. They have been found to be the surest means of preventing unjust discriminations. In England they are known as "joint purse" arrangements, and generally take the form of money pools because of the greater consolidation of the lines. Agreements to charge equal rates for competitive traffic have been much more uniformly observed in Great Britain than with us, and hence the more advanced arrangements for the division of traffic have not been so necessary.

following interesting figures relative to the trunk lines have never been published, but rest on official authority, and have been inspected by me. The details for each road are for obvious reasons omitted.

	TONNAGE CARRIED.	GROSS REVENUE.	REVENUE BALANCES.	PER CENT.
Westbound, 1877 to 1886 . .	8,984,294	$36,356,163	$482,537	1.32
Eastbound, 1882 to 1885 . . .	30,423,749	65,133,997	272,015	0.41
Boston and New England, Live Stock, 1882 to 1886 .	1,347,407	3,377,487	23,072	0.68
All divisions, 1877 to 1886 .	49,792,626	129,530,377	1,200,729	0.9

I add a few examples, without mentioning the exact date or species of traffic:

RAILROAD.	TOTAL RECEIPTS.	BALANCES.	PER CENT.
Baltimore and Ohio	$91,133	$105 rec'd	0.1
New York Central and Hudson River . . .	3,861,364	612 paid	0.016
Pennsylvania	18,350,020	47,657 paid	0.25

The balances paid by the different companies which carried in excess of their allotments were on the total traffic:

New York Central . . . . . $\frac{14}{100}$ of 1 cent per 100 pounds.
Pennsylvania . . . . . $\frac{25}{100}$ " " " "
Grand Trunk . . . . . $\frac{11}{100}$ " " " "
Lackawanna . . . . . $\frac{10}{100}$ " " " "

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But joint purse agreements are not at all uncommon.[1] Many of them have been made under the express sanction of Parliament or the commission to which the power of approval has been delegated. The apportionments of traffic are moreover made for much longer periods than in the United States, — a fact ascribable to the comparative constancy of business and the settled character of commercial relations. Thus Gladstone allotted pooling percentages for a term of five years in 1851 and made a further award for fourteen years in 1857.[2] In 1853 the manager of a single railway called attention to twenty-seven such pooling arrangements made by his own line within a very limited period, dividing the traffic in all salient points. The railways among themselves and the railways and canals are shown to form a "happy family."[3] It is simply an additional proof of Gladstone's statement that competition between railways is like a lovers' quarrel: *breves inimicitiae, amicitiae sempiternae.*[4] The joint fund arrangements are found in large numbers to-day, and the clearing house acts as the agent of the interested parties, in this respect very much like the general commissioners of our traffic associations.[5] In England, while Parliament may still disclose a certain jealousy of the working arrangements of this kind, it does not think of pro-

[1] As an example at present *cf.* the lines at Preston, Select Com. (1881), qu. 12,050.

[2] The first pool was between the Great Northern, the London and North Western, and the Midland railways; the second between the same and the Manchester, Sheffield and Lincolnshire. Parliament has sanctioned pools between the South Eastern and the London, Chatham and Dover railways; and also between the London, Brighton and South Coast and the South Eastern companies.

[3] Rep. Sel. Com. on Railway and Canal Bills (1853), Evid. (Huish) qu. 120–310.

[4] Speech on bill of 1844 (Hansard, vol. 76, pp. 480–509). Gladstone adds: "I would no more trust the railway proprietors on railway matters than I would Gracchus speaking of sedition. I know of nothing more chilling than the hope which railway directors hold out from competition." The whole speech may be found in full in Galt, Railway Reform, its importance and practicability considered (1864), App 254–266. Galt's book itself is a highly fanciful plea for uniform cheap charges, based on Rowland Hill's postal reform. The first edition was published in 1843, and demands state purchase.

[5] Rep. Joint Select Committee on Railway Companies' Amalgamation (1872). Evid. (Dawson) qu. 5571–2. The clearing house does not fix the percentages as did our pool commissioners.

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hibiting them; it simply makes them subject to governmental regulation. The wisest thinkers, even among those who cannot be deemed by any means apologists of the railways, confess that some of the present abuses may be obviated by a more intimate fusion of interests in this direction.[1]

On the continent pooling arrangements are carried out to a much greater extent, and personal discriminations are hence correspondingly less frequent. In Germany they are known as *Kartellen* or *Instradirungs-verträge*.[2] Owing to the greater complexity of the lines and the lesser degree of consolidation, they generally take the form of traffic pools. One important example of a money pool was the great German Austrian union (*Deutsch-oesterreichischer Verband*), an international association from 1868 to 1873. But this was finally abandoned on account of the difficulty of making the exact allotments, it being not a gross money pool as in England or with us, but a net money pool with deduction for expenses.[3] Since the railways have been almost entirely purchased by the state in Prussia, the necessity for pools has diminished, but the rivalry between the various state systems is so intense that a series of interstate pools has sprung up. In order to facilitate the execution of these agreements it has even been provided that the shipper shall no longer have the right to select the route by which his goods are to be transported.[4] The railways ship the goods as they please, the sole condition being that the freight is to be carried by the cheapest or otherwise most favorable line. Not only are the pools effectually enforced between the state railways themselves but also,

[1] Sir B. Samuelson, Report on Railway Goods Tariffs (1886), p. 22. That the railway men favor this plan is of course obvious; *cf.* Grierson, Railway Rates (1886), sec. xvi.

[2] Or Instradirungs-vereinbarungen.

[3] Reitzenstein, Ueber einige Verwaltungseinrichtungen und das Tarifwesen auf den Eisenbahnen Englands, pp. 152 *et seq.* This contains a comparison of the English and German pools. For other cases, see Ulrich, Das Eisenbahntarifwesen, § 63.

[4] The sole exception is in case of goods subject to customs duties; Beschluss des Bundesraths, March 12, 1885, which changes § 50 of the Betriebsreglement. *Cf.* also Endemann, Das Recht der Eisenbahnen (1886), Fünfter Abschnitt.

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when there is any danger of serious competition, between the railways and the waterways, including both canal and river traffic. In the allotment of percentage, moreover, the shortest line is not taken as the basis, but the shorter road is deemed equal to the longer road only up to twenty per cent of the longer distance.[1] The pooling arrangements in Germany have been of signal service in simplifying and equalizing the charges, which prior to their introduction were of the most complicated and often outrageously unjust character; and to-day they still perform the most valuable services in international traffic. No one any longer thinks of opposing them in principle.[2]

In Austria, where the state and private railways exist side by side, money and traffic pools are of daily occurrence. No sooner is a new route opened than it receives its share of the competitive traffic, and is thus deprived of any pretext to undertake a railway war. It may be declared that all competitive traffic in Austria is strictly pooled.[3] The state railways themselves divide earnings or traffic with the water routes, and are thus able to avoid crying discriminations. In Belgium, where one large private company, the *Grand Central Belge*, has been the most formidable potential competitor of the state railways, the government has concluded a pooling agreement for the strict division of all competitive traffic. The line over which the shipment is made receives all the *frais fixes*, or terminal charges, as well as one-half of the *frais variables*, or movement charges. The remainder is pooled in fixed percentages.[4] The sad experience of railway wars and exorbitant

[1] This is known as the doctrine of "virtual" or "computed" distances. Schreiber, Das Tarifwesen der Eisenbahnen, S. 245–249. It is somewhat similar to our "constructive mileage."

[2] *Cf.* von der Leyen, Die nordamerikanischen Eisenbahnen (1885), S. 296: "The European expert finds these arrangements entirely objectionable" ("findet in solchen Verbänden nicht Verwerfliches"). *Cf.* also Obermayer, Ueber Tarifverbände und Eisenbahnkartelle (1879).

[3] Sax, Die Verkehrsmittel, Bd. II, S. 102. For full details as to a late instance (the Arlberg line), see *The Railroad Gazette*, 1884, p. 636.

[4] According to the doctrine of "virtual distances." But if the longer line's mileage exceeds the other by more than 25 per cent, it receives nothing beyond the terminals and one-half of the movement charges.

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discriminations in the past has long since convinced the government of the absolute necessity of some agreements with its private competitors. Just as competition in general pulls the best men down to the level of the most unscrupulous, so in the competition between the state and the private railways the government itself was compelled to descend to the methods of private companies and practise discriminations of the most flagrant nature, in some cases going so far as to discriminate against its own property in the shape of canals. Until the state owns all the railways, such pools will be necessary and beneficial to all parties concerned.

In France the principle of territorialization from the very outset has materially lessened the need of pooling arrangements. If the division of the field were absolute, the division of traffic or earnings could not exist, for the same result would be attained in either way. In some few cases, however, the chief lines partially overlap each other and thus give rise to competitive centres, but the dangers of competition are immediately obviated by the formation of pools, which are recognized as perfectly legitimate.[1] The state line itself has made such a compact with the Orleans company, in which the percentages depend to a certain extent on the differences of grade.[2] France has no faith in railway competition. In Italy the railways are sharply divided into two networks, and there is no competition and hence no necessity for pools. All international traffic, however, is effectively pooled. In Holland, where the pooling policy is far less developed, the results of the competition between the railways, and especially the railways and waterways, have been so unsatisfactory and the discriminations so crying that the parliamentary commission of 1881–2 desired to seek refuge from the railway wars in universal consolidation, and would have advocated state purchase had it not

[1] A prominent French official writes to me as to the existence of money pools between railways, and even between railways and canals: "Il en existe plusieurs exemples. C'est chose parfaitement admise." So, *e.g.*, the Chemins de fer d'Ouest et d'Orleans.

[2] Convention de 1883 avec la Compagnie d'Orleans, art. 16, in Picard, Chemins de fer français, t. 6 (1885), p. 396.

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been for financial difficulties. Mere legislative prohibition of discriminations they confessed to be futile, and therefore proposed to hasten on the process of combination by furthering the consolidation of certain smaller lines, and by refusing charters to any new competing lines.[1]

All the European countries, therefore, inculcate the same lesson. Unjust discriminations and especially preferential rates are found in inverse ratio to the pools. Where the pools are legalized and most effective, as in Germany and Belgium, the abuses are least; where the pools are less frequent, as in England, the abuses are greater; where the pools are rare and ineffective, as in Holland, the abuses are scandalous. Experience is no less convincing than theory. As long as there is no complete consolidation we cannot prevent both pools and discriminations. We must choose between them. The full development of the one means the disappearance of the other. With an universal pool, we can stop all unjust discriminations produced by the stress of competition; with partial pools we can *pro tanto* abate the discriminations. Nothing will be gained by the attempt to stop pools. We may prohibit them, but cannot prevent them. And if they could be prevented, they would simply disappear for a time; the causes which rendered their existence necessary would reassert themselves, and in the long run prove invincible, with the only result that in the mean time the country would have been exposed to an intensification of the very evils which it was desired to suppress.

That there is a possible danger in pools is indeed not to be denied. The inference, however, is simply the necessity of effective public regulation. What the public fears is the temptation to impose exorbitant charges. The policy of avoiding competition from the outset on the continent of Europe has certainly had some influence in preventing so quick a reduction of charges as with us. But rates in this country are perhaps as low as can be reasonably desired.

[1] *Cf.* the report itself (October, 1882). For an abstract, see *Archiv für Eisenbahnwesen*, 1883, S. 587–590. *Cf.* Jacqmin, Chemins de fer des Pays-bas, 2me éd., p. 87.

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There is no serious complaint of extortion, and there is far less probability of extortionate charges here than in European countries, because of the exceptionally large amount of water competition in the United States. The gravamen of the complaints is discrimination, not extortion. There is no need of conjuring up phantom dangers. We are actually confronted by certain specific abuses, and it is a superficial policy to abolish the means of preventing these abuses because of the dim possibility of other abuses which do not exist.

One misconception more fatal than any yet discussed still remains. It is commonly supposed that pooling entirely prevents competition. This is a mistake. Pooling maintains the advantages of a healthy competition and at the same time prevents the dangers of an utterly unrestricted or "cut-throat" competition. The mere agreement to divide traffic or earnings in certain percentages does not put a stop to all competition. Each of the various roads will still attempt to procure as much business as can possibly be obtained in a fair and open manner. If any line while maintaining the published rates is yet enabled to run above its allotted percentage, this surplus will justify the railway in demanding an increased percentage in the new allotment that is to be made at the expiration of the monthly or yearly pooling arrangement. The incentive to fair and healthy competition is not removed; each line will endeavor to vie with its rival in accommodations and facilities. But the temptation to take unfair advantages of its rivals is diminished, for an increase of traffic due to rebates or violations of the pooling agreement manifestly cannot justify a claim for increased percentages. A successful pool prevents railway wars with the accompanying discriminations, but does not prevent healthy emulation to attract business. It simply raises the plane of competition to a higher level.[1]

The abolition of pooling would in fact hasten the very result which it is desired to avoid. Division of the traffic and the earnings form, as we have seen, the fourth and fifth step in the

[1] This is another of the points entirely overlooked by Hudson, The Railways and the Republic, p. 229.

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progress of combination. The final steps are lease and absolute consolidation. The tendency to combination is irresistible; all endeavors to stem the current have been and will be futile.[1] If therefore pools, which still permit competition to a limited degree, be abolished, the process of complete consolidation, which utterly precludes competition, will be accelerated. Under the system of division of earnings, the weaker roads are still enabled to procure a share of the business and thus maintain a limited competition; remove the guarantee of allotted percentages, and it is simply a question of time before the weaker roads are driven to the wall and then bought out by their more sturdy competitors. No clause in the Interstate Commerce act prohibits the stronger line from lowering its charges and thus inaugurating a war of rates, provided it be done publicly. The enforced publicity of charges is undoubtedly an immense step in advance; but while no increase of charges can be made until after ten days' public notice, reductions in the charges may take place without previous public notice.[2] Railway wars are hence by no means prevented. Pools are indeed a makeshift, but the disappearance of this modified and partial form of combination would most assuredly lead to a more complete and absolute form of combination. The logical outcome will be a concentration of the railways in the hands of an exceedingly small number of corporations, and the development may even be carried to a stage which the telegraph lines have already reached — a practical monopoly of one huge corporation. The federal law is thus unwittingly hastening the very result which it intended to frustrate. It defeats the very purpose which it was designed to accomplish. Our legislators imagined that

[1] *Cf.* English Select Committee (1872), p. xxvi: "While it is extremely doubtful to what extent the less complete forms of combination admit of competition, and what is the value of such competition, there can be little doubt, judging from the past, that they cannot be maintained as the ultimate forms, and are sure, whatever principles may be laid down by committees or commissions, to end in complete fusion. So much stronger is the power of wealth, self-interest, and united action on the part of the companies, acting each in its own case with clearness and decision, than that of any general principles by which committees and commissions have supposed that the public interest might be protected."

[2] Sec. 6 of act.

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they could prevent combination by prohibiting pooling; in reality they have destroyed that which still preserves partial competition and by prohibiting pools have made ultimate consolidation less remote. In their anxiety to prevent monopoly they have taken the surest step to create monopoly; in their ignorance of economic laws, while hoping to raise an impassable barrier to combination they have in reality levelled the course. The result will be the exact opposite of their anticipations.

The progress of this consolidation may indeed be arrested for a time. Railway wars cannot of course be the normal condition, and the short-haul clause of the law will have some slight effect in preventing the inordinately low war-rates to centres of competition. It is therefore possible, nay, almost certain, that the results of the pooling policy will be attained in another way — through the medium of "differentials." Rather than enter upon a war of rates, the stronger roads, which through their better facilities would tend to carry the larger portion of the traffic, will consent to give the weaker lines a "differential," *i.e.*, allow them to charge so much less per ton, and to attract in consequence more business. The limit of the "differential"[1] will depend naturally on the desire or ability of the weaker line to declare war rather than to accept less than the demanded differential. This system, however, is virtually, although not nominally, tantamount to pooling, in so far as it is a form of combination which still retains a certain amount of competition. But if successful, it is open to the same objections as pooling; while the absence of any vigorous executive authority to enforce the agreements will be felt still more strongly than has hitherto been the case in the traffic associations and pools. This policy of what we may call "differential pools" cannot possibly be stopped by any law.

The anti-pooling clause[2] of the federal law thus sins in

[1] This technical phrase is used in an entirely different manner from that described in my first essay, POLITICAL SCIENCE QUARTERLY, June, 1887, pp. 236, 237.

[2] Sec. 5: "That it shall be unlawful for any common carrier . . . to enter into any contract, agreement, or combination with any other common carrier or carriers, for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portions thereof."

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a double manner. It weakens the government in its attempt to prevent discriminations, and it is destined to produce a state of affairs precisely the contrary of what was intended. The first three sections of the act, which define and forbid unjust discriminations,[1] are in effect simply declarative of the common law, although based almost literally on Cardwell's Traffic act of 1854. It may well be doubted whether this mere legislative enunciation and prohibition will suffice to abolish the evils complained of. The definition is so utterly vague as to be susceptible of varied interpretations; and whatever interpretation be adopted, it must, as we have shown in the previous essay, be so essentially elastic as to preclude any hard and fast application. Whether the prohibition of unjust discrimination will be anything more than the expression of a pious wish, depends largely on the commission; but the law imposes on the commission an unnecessarily severe burden, and by prohibiting pools removes what would have been a most serviceable crutch with which the better to support the burden. If self-help, or at least private co-operation, be a fundamental feature of the American polity, then this law violates the American idea, for it voluntarily resigns the advantages that would accrue from the self-help of the railways. I do not object to state interference, but I do object to the hasty abandonment of an institution which tends to decrease the necessity of state interference. And when the abolition of the institution results, as is assuredly the case with pools, in hastening the advent of the very monopoly which it was designed to avoid, then the prohibition becomes not only unwise but absolutely absurd. The anti-pooling clause is a sad

[1] Sec. 1 declares that "all charges . . . shall be reasonable and just; and every unjust and unreasonable charge . . . is prohibited and declared to be unlawful." Sec. 2 defines an unjust discrimination as the charging any persons different amounts for a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Sec. 3 declares it unlawful "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." These three clauses are virtual repetitions, and afford no basis for a definite decision.

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evidence of the results of demagogic ignorance in producing hasty and ill-advised legislation. The Philistines of the daily press exaggerate the dangers of the short-haul section, because these lie on the surface; but for the far more important fifth section of the federal law they have neither eye nor ear. Fortunately pooling will practically continue in another form which Congress will be powerless to prevent.

The Senate select committee of 1886 has at least this claim to respectful attention, that it opposed the prohibition of pools. The abandonment of its position was an inexcusable concession to popular clamor. A careful analysis of the testimony discloses the fact that not only all the railway officials, but also a large majority of the intelligent shippers, had become convinced of the break-down of competition and the necessity of pooling. The railway men opposed unrestricted competition because it curtailed profits; the intelligent shippers opposed competition because it produced discrimination.[1] Both were correct. The Senate committee therefore, swayed by the unanimous opinion of the railway men and the preponderant weight of testimony on the part of the public, decided that "the evils to be attributed to pooling are not those which most need correction," and that "it would seem wiser to permit such agreements rather than by prohibiting them . . . to endanger the success of the methods of regulation proposed for the prevention of unjust discrimination."[2] That the members of the committee, with a few honorable exceptions, should have seen fit to abdicate their strong position is sincerely to be regretted. The clause as it stands is in defiance of the teachings of experience and the laws of political economy.[3]

[1] Among the shippers who uphold pooling may be mentioned (*vid.* Report, Testimony) Bacon (707), Burrows (1170), Chapin (684), Dunnell (1330), Elliott (695), Field (655), Francis (919), Goodman (1104), Gue (1070), Herrick (217), Joseph (1030), Lowry (721), Meek (1012), Miller (269), Murch (941), Noble (988), Phelps (1410), Reynolds (1185), Root (1198), Speare (347), Tredway (841), Welch (1445), Wicke (766), and Williams (1059). The number of shippers who oppose pools is far smaller, and of these the great majority base their opposition on their belief in "free, open competition in railways, as in other things"!

[2] Report, p. 201.

[3] Even European experts who are by no means admirers of the American rail-

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Free competition between railways, as a regulator of transportation charges, is thus a mere chimera.[1] But "competition" has become such a shibboleth with a certain class of reformers that it may be well to devote a few words to other forms which are advocated as panaceas for existing abuses.

Perhaps the most common recommendation is that of *competition of carriers on the line.* Divorce entirely the business of the common carrier from that of the highway; let the corporation indeed own the rail*way*, but let every one have the right to run his own trains and use his own locomotives on this railway. This indeed would be perfect competition, but of a very different kind from the competition *between* the railways that we have been considering. Alluring as is this plan at first blush, it is open to three vital objections. 1. It is impracticable, or, if practicable, would be far more costly. 2. It would not cure the great evils of the present system. 3. It would produce abuses far worse than any which now exist.

First, the plan is impracticable, or, if practicable, would be far more costly. The project is not new. Competition between carriers was the original theory. The early railway acts were based on the canal and turnpike acts. When the system of turnpike trusts was inaugurated in England in 1706,[2] the original public character of the king's highway disappeared, and the control fell into semi-private hands. But the highway of course remained free to all on payment of the tolls. With the advent of canals the private speculative element was introduced into transportation; for although a very few of the canals were put into the hands of canal trusts, the first canal[3] and most of the others were built by private individuals and corporations. The early canal acts, however, invariably contained the clause

way system concur in this opinion. See *Archiv für Eisenbahnwesen*, 1887, S. 333. *Cf.* also Jeans, Railway Problems (1887), p. 518.

[1] *Cf.* Bontoux, Die Concurrenz im Eisenbahnwesen (1873).

[2] The old Watling road. The first turnpike act empowering the raising of tolls was passed 1663, but the power was given to overseers, not trusts. It is only in the last few decades that the turnpike trusts are giving way to the highway boards and that the public character is being restored.

[3] Duke of Bridgewater's canal from Liverpool to Manchester. Acts of 1758, 1759, and 1762.

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that all persons without distinction should have free liberty to use the canal on payment of tolls. When the first tramway bill was enacted in 1801,[1] it adopted this idea, and provided, among other sections borrowed *verbatim* from the canal acts, that all persons should have the right to use the tramway with their own horses and wagons. In the charter of the first railway built with the avowed purpose of using steam locomotives a similar clause was introduced, modified so as to meet the exigencies of the new methods of transportation.[2] For many years the identical provision is found in all the railway acts.

In the United States analogous provisions were inserted in the early charters. So, *e.g.*, in the charter of the Ithaca and Oswego railroad.[3] In the general railroad law of Prussia competition between the carriers is likewise legalized, after the expiration of three years from the opening of the railway.[4] In France the principle was carried so far as actually to distinguish between the charge for the use of the track, or the toll (*droit de péage*), and the charge for the transportation itself (*prix de transport*). To this day even, the concessions of the railways contain the legal distinction.[5] Everywhere, in fact, a sharp line was drawn between the two functions of the railway company — that of providing the public highway free to all and that of furnishing the means of transportation on the highway. The railway company was not excluded from the latter function, but it was thought that its activity in this direction would be very slight.

The experience of a very few years totally destroyed all these

[1] The Surrey railway from Wordsworth to Croydon. *Cf.* Francis, History of the English Railway (1851), vol. i.

[2] Liverpool and Manchester Railway act, 7 Geo. IV, cap. 49, cl. 165: "All persons shall have free liberty to use with carriages all roads, ways, and passages for the purpose of conveying goods or passengers or cattle."

[3] Sec. 12: "All persons paying the toll aforesaid may, with suitable and proper carriages, use and travel upon the said railroad, subject to such rules and regulations as the said corporators are authorized to make by the ninth section of this act. Laws of New York, 1828, p. 17. The "proper carriages" of course included the steam-carriages.

[4] Eisenbahngesetz, 1838, § 27.

[5] Picard, Chemins de fer français, t. v, p. 184; Jacqmin, De l'exploitation des chemins de fer, t. i, p. 20.

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anticipations. As a matter of fact the transportation was conducted solely by the railway company. Even in those countries which earnestly endeavored to enforce the provisions, legislation was impotent to check the natural tendency. There were weighty reasons which did and always must militate against the success of any such scheme.

The most obvious objection, of course, is the technical one. The technical character of the railway undertaking renders it imperative to have unity of administration. If every shipper could run his own trains, it would be almost impossible to preserve order or avoid serious accidents. The private trains would have no means of enjoying terminal or other conveniences, and if the railway company were compelled to afford these conveniences, it would soon display such power of annoying the private shippers as to render the plan nugatory. At a time when the engineers were grappling with the problem and devising schemes for allowing two trains to pass each other on a single track, the project of competition between private locomotives might be plausible; to-day it is unintelligible and absurd. Entirely apart, moreover, from the objection of technical impracticability, is the vital difficulty of increased expense. The cost of service would be so enormously increased as to result in higher, not in lower, charges. All shippers would not be large shippers. The number of those who could despatch a train with forty cars would be exceedingly limited. The result would be the necessity of ten engines for small trains where one now suffices, as well as a vast increase in the extent and facilities of the terminals and a proportionate increase in operating expenses. The control of transportation is indissolubly bound up with the control of the roadbed.

But secondly, the scheme would not cure the great evils of the present system. What is sought is the abolition of unjust discrimination. It is difficult to see how free competition of the carriers would effect this. The railway would still be empowered to charge tolls, but it is impossible, as has been shown in the preceding essay, that these tolls should be alike for all classes or distances. The expenses of the pri-

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vate trains would of course be proportional to cost of service; the cheap goods would be more expensive to transport than the dear goods. In order, therefore, to render the transportation of cheap or distant articles at all possible, the tolls would have to vary in a large degree in their favor.[1] According to the principle of value of service it would be requisite to have classification and local discrimination in tolls, as in the turnpike and canal tolls, but in a necessarily increased proportion. The private shippers of coal, *e.g.*, would have to defray not only the operating expenses proper but also the fixed charges representing the capital invested in the rolling stock; the railway company, on the other hand, could afford to transport this coal at lower rates, because it could compensate by charging higher rates on other traffic which is better able to pay. Under a *régime* of competition of carriers, therefore, it will be necessary to differentiate the tolls correspondingly unless the present traffic in cheap or distant goods is to be entirely stopped. The discriminations represented by the tolls would be precisely equal to the present discriminations in the total rates. To fix the tolls by law would not mend matters, for if the law can successfully fix tolls, it can equally well fix the total charges as imposed at present. The principle involved is the same. But if the extent of tolls is left to the discretion of the railway companies, then the condition of affairs is not improved a whit. The difficulties of regulation according to a well-digested system would not be diminished.

But thirdly, it is very probable that abuses would be engendered far worse than any which exist. There would be such an evident gain in the larger shippers combining to lessen running expenses that before long competition would again forcedly result in combination. This would practically intensify personal discriminations. The large shippers might through combination reduce the charges to a minimum, and, not being common carriers, would refuse to take the goods of the smaller shippers. The latter would thus be put at an immense disad-

[1] Mr. Hudson proposes equal mileage tolls (Railways and the Republic, p. 397). But the impracticability and inadvisability of this have already been shown.

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vantage, while now they have at least an equal right to insist on transportation. If it be objected that the small shippers might also combine, the answer is that the practical difficulties in the way would be well-nigh insuperable; and that even if they were overcome we should no longer have the condition of free competition between the carriers. The very basis of the argument would fall away.

The legitimacy of such a conclusion is emphasized by the history of the English railways. For there, as in other countries, we find vestiges of an arrangement which is only a slight variation of the scheme proposed. That is, although we do not find cases of competition between carriers who own their locomotives, there have been instances of competition between shippers who own their own cars. This is technically known as the principle of *separation of traction and carrier*.[1] The most striking example of the inadequacy of the remedy suggested is seen in the case of the coal companies. Each of these as a rule owned its own cars. Yet the result of the competition has been the building up of a few gigantic monopolies to the exclusion of the smaller shippers. The agglomerated companies always succeeded in procuring better facilities in the way of storage of coal, *etc.*, in the depots than the isolated small shippers, and the inevitable tendency has reasserted itself. So far has this process been carried as to practically preclude small shippers from sending coal without the consent of the larger companies.[2] Separation between motor and carrier would aggravate, not diminish, the abuses.

So incisive are the arguments against free competition of carriers that every careful scientific investigation of the question has abundantly proved the fruitlessness of the scheme. Already in 1839 an English committee reported, after an extensive review of the facts, that such a plan was no less undesirable than impracticable.[3] In 1844 Gladstone's committee repeated the

[1] Or of "motor" and carrier.

[2] *Cf.* Royal Commission (1866), Evid. qu. 12,502–12,519; *ibid.* (1865), qu. 9772 *et seq.*, 9853 *et seq.* Already in 1853 we find the same tendency. *Cf.* Joint Select Committee (1853), Fifth Report, pp. 201–206.

[3] Select Committee on Railways (1839), Second Report.

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elaborate refutation.[1] But the attempt to enforce this competition was nevertheless found in the charters. Cardwell's committee of 1853 still discussed the project.[2] But from that time the clauses in the charter were regarded as mere archaic curiosities. The Duke of Devonshire's commission abandoned the fiction once and for all.[3] In Chichester Fortescue's committee the efforts of the early legislation are reviewed with a grim sarcasm;[4] and, finally, in Mr. Ashley's recent committee the whole matter is not even deemed worthy of separate mention.[5]

But although England had been radically cured of her early misconceptions, ignorance of English experience led to a revamping of the old doctrines on the continent. The matter was taken up at the close of the sixties in Germany, and for several years would-be reformers and even economic congresses sounded the praises of the new panacea.[6] It became, as has been wittily remarked, the *enfant terrible* of the railway question in Germany and Austria. Thrown out of one window, it came bobbing in at the next.[7] Book after book was written to explain the advantages of the system, but science and common-sense again triumphed,[8] and to-day the project is considered as definitely laid to rest. Yet scarcely has the matter been finally decided on the continent when we are called upon to go over the same tedious ground in the United States. Here too the plan is elaborately set forth[9] with a naive confidence in its

[1] Select Committee (1844), p. 19, Appendix to Evidence.

[2] Joint Select Committee (1853), Fifth Report, p. 8: "In theory the railway is like a common highway; in practice, no one can carry upon a railway but the owners of the line."

[3] Royal Commission (1867), Report, § 7.

[4] "Committees and commissioners, carefully chosen, have for the last thirty years clung to one form of competition after another," *etc.* Select Committee (1873), Report, p. xviii.

[5] Select Committee on Railways (Rates and Fares), 1882.

[6] Technically known as "Die Freiheit der Schiene."

[7] Sax, Die Verkehrsmittel, Bd. II, S. 112.

[8] *Cf.* the discussions in Reitzenstein, Die Gütertarife der Eisenbahnen (1874), S. 42–59; Perrot, Die Eisenbahnreform (1871), S. 34–47; G. Cohn, Streitfragen der Eisenbahnpolitik (1874), S. 17–32: Bilinski, Die Eisenbahntarife (1875), S. 14 *et seq.*

[9] Hudson, The Railways and the Republic (1886), ch. x, esp. p. 400. Mr. Hudson is just about twenty years behind the times. His arguments are almost word for word those of Dorn, Aufgaben der Eisenbahnpolitik (1874).

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novelty and efficacy — a confidence that can be excused only in the assumption of woful ignorance of the literature or absolute incapacity to learn from experience. But it plainly cannot be the duty of a scientist to refute in detail what has been disproved time and time again. The practical character of the American public, moreover, is so well assured as to render the necessity of any such refutation extremely improbable.

Another variation of this form of competition deserves a passing notice, *viz.*, the demand for the enforcement of *running powers*. This theory is supposed to uphold competition by allowing the trains of any one railway to pass over the tracks of the other. The English Parliament, after having abandoned all the other theories of competition, still clung to this; and one of the main features of Cardwell's act of 1854 was an attempt to realize this idea. In the United States also it is advanced as a panacea. But Robert Stephenson already in 1853 emphatically condemned such running powers as incompatible with safety and practical administration.[1] The committee of 1872 finally forsook the old position and came to the conclusion that in *all* cases where running powers existed they were the result of voluntary agreements.[2] It is practically impossible to compel the railways to grant such powers against their will, and if it were possible it would not be wise.[3] It would be far more expensive and dangerous, and it would put a check to all railway building by powerful capitalists, for it would render the quantity of traffic carried by any one line absolutely uncertain and subject to the discretion of the government. In France, likewise, there have been repeated attempts to enforce these running powers, but the only case in which they have not ignominiously failed has been that of branch, not competing, lines.[4]

[1] Select Committee on Railway and Canal Bills (1853), Evid., pp. 115, 116.

[2] Select Committee on Railway Cos. Amalgamation (1872), Rep., pp. xlv, xlvi.

[3] Hudson, Railways and the Republic, p. 382, gives a few familiar examples of one track being used jointly by two railways. But that is quite another thing from allowing one track to be used by *all* the other lines, especially if the first one does not consent. *Voluntary* arrangements are not enforceable running *powers*.

[4] Thus in the revision of the *cahiers de charge* imposed on all the "great companies" in 1857–59 these running powers were reserved to all branch lines and prolongations on payment of a fixed *droit de péage*. *Cf.* the documents themselves, titre vi,

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But the most amusing error remains to be noticed. Running powers or "working arrangements" when voluntary are just the opposite of what they are supposed to be. In lieu of being a form of competition, they are a form of combination—the forerunner of pools and frequently their concomitant. The railways agree to forward traffic over each other's lines, or to divide the traffic in cases where they use the same line, not in order to maintain competition but in order to avoid competition. And if enforceable running powers were universal, they would simply result again in private agreements. It would not be an advance of competition but a check to competition. Even if it were practicable, it would simply accelerate the process which it was designed to arrest. Compulsory competition is an absurdity. Fortunately the Interstate Commerce law expressly disclaims all intention of enforcing such working arrangements,[1] although it may well be doubted whether the legislators were actuated by the reasons just recounted. The prohibition of pools militates against the acceptance of any such flattering imputation.

There remains finally the subject of *water competition.* In so far as we have to deal with artificial waterways the same unmistakable tendency to combination is apparent. The competition of canals is virtually of no importance as the regulator of railway charges. In the first quarter of this century the charges on the English canals were so extortionate and the abuses so extravagant that great hopes were staked on the competition of the railways. The railways indeed did compete with the canals, but so effectually as to silence all competition. They bought up the canals or amalgamated with them, and before long the condition of affairs was reversed. New canals were now built to compete with the railways in place of new railways being built to compete with the canals. The conditions had shifted. But all was in vain. Already at an early period the rivalry of the canals had been overcome;[2] by 1872 the influence of the

art. 61, in Picard, Chemins de fer français, t. iv, p. 71. As to the difficulties to which even this has given rise, see Aucoc, Droit administratif, t. iii, pp. 779 *et seq.*

[1] *Cf.* sec. 3.

[2] In 1865, of the four thousand miles of water and river communication in England and Scotland, about one-third had been amalgamated with the railways. Royal Commission (1867), Rep. App. qu. 9899 *et seq.*

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canals as competing factors was infinitesimal.[1] The railways were the victors; competition had again failed.

On the continent the condition is the same. Everywhere the canals have been losing their traffic. Even when owned by the state, their efficacy is a thing of the past, although in such cases there can naturally be no consolidation with the private railways.[2] Isolated efforts are yet made to further the construction of new canals, but the better opinion now recognizes the ultimate uselessness of such attempts.

Although the movement has not progressed quite so far in the United States, the tendency is the same. From 1830 to 1850 the canals were formidable competitors of the railways, but from that time on the private canals were gradually bought up, while the state canals were either abandoned, sold, or reduced to a state of utter decrepitude. The efforts of the Clinton league in New York were unable to arrest the movement. In 1886 an expert witness stated to the Senate committee: "I do not think that there is a canal in the United States, except the Erie, that is not more or less controlled by the railroads."[3] The competition of artificial waterways can no longer be relied on.

In respect to natural waterways the matter is slightly different. The sea and navigable rivers cannot be subjected to a monopoly.[4] In such cases the competition is real and active, although only spasmodic in the case of internal navigation. The importance of the Erie canal, and the extent to which it really regulates the charges by rail, is due solely to the fact that

[1] Select Committee (1872), Rep., p. xxix. Also pp. xx–xxiv, with full references to the evidence. *Cf.* in general the admirable work of Freiherr von Weber, Die Wasserstrassen Nord-Europas (1881), S. 92–111. Also de Franqueville, Du régime des travaux publics en Angleterre, 2me éd. (1875), t. ii, pp. 274–306.

[2] *Cf.* Nördling, Die Wasserstrassenfrage in Frankreich, Preussen und Oesterreich (1885), esp. S. 28, 128, 158, 171–176. A French translation of this work has just been published.

[3] Cullom Committee Report, Test. (Wistar) 507. For a careful investigation of the whole question, *cf.* Mosler, Die Wasserstrassen in den Vereinigten Staaten (1877). Much valuable material may be found in Kupka, Die Verkehrsmittel in den Vereinigten Staaten (1883), S. 41–126.

[4] Yet in England there are instances even of this. *Cf.* Select Committee (1872), Rep., pp. xix, xx. Select Committee (1881), Evid. qu. 8133.

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it is a link in the chain of natural waterways. But the influence of internal navigation is apt to be seriously exaggerated, and the exuberantly enthusiastic expressions of the Cullom report savor, it must be confessed, slightly of rhodomontade.[1]

Finally, it must not be overlooked that water competition, in so far as it is an important factor in internal transportation, is precisely the chief cause of local discriminations. Differential rates are due in great part, as we have seen, to the existence of competing centres. As long as the competition exists the discriminations must continue. Hence those who clamor for the construction of new waterways or the improvement of the old may indeed succeed in effecting a reduction of charges, but forget that they are only strengthening the causes of whose results they complain. To maintain competition and avoid discrimination is impossible.

The chief provisions of the federal law have now been discussed. There remains to be considered only the machinery to enforce the law, *i.e.*, the Interstate Commerce commission.

The commission idea is essentially a product of the Anglo-Saxon mind. On the continent of Europe direct administrative control has always been comparatively stringent, and the extent of state interference has been conditioned only by considerations of a political nature.[2] Almost every possible system has been tried; and if entire immunity from abuses has not been attained, it is not for lack of serious endeavors on the part of the govern-

[1] "The manifest destiny of our country points unerringly to this *emancipation of the waters* as its next great work, a fitting sequel to the emancipation of the slave, a a destiny not of war, but of beneficence and peace, to which the heart of the nation turns as spontaneously and resistlessly as the waters of its great river flow to the Gulf." Report, p. 175. *Cf.* with this "manifest destiny" the figures as to the decadence of the Erie canal in Statistics regarding the Movement of Eastbound and Westbound Traffic over the Trunk Lines, *etc.* (1885), pp. 16, 17; also Report on the Internal Commerce of the United States (1885), pp. 408–414. The Windom Committee likewise favored government canals. But the value of their suggestions may be inferred from the fact that they also recommended one or two government railways to regulate the private lines. Senate Select Committee on Transportation Routes to the Seaboard, Report (1874), pp. 187–242.

[2] Weber, Nationalität und Eisenbahnpolitik (1876). Audiganne, Les Chemins de fer d'aujourd'hui et dans cent ans (1858–1862).

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ments. In no country was the public nature of the railway business lost sight of. Even where financial reasons led to the construction of railroads by private companies, the fostering and restraining action of the public authorities was never absent. The corporations were not able to dictate terms to the state.

In England the history was quite different. The railways, indeed, started out as humble suppliants for favors, but governmental action confined itself to seemingly guarded restrictions in the charters, such as maximum clauses and limitations of dividends, all of which were soon shown to be utterly powerless to prevent abuses. The railways increased so rapidly that their position soon became that of dictators, in place of suppliants. Warnings of able men like Morrison went unheeded.[1] Praiseworthy attempts were still made by far-sighted statesmen, but the railway opposition was sufficiently powerful to crush all interference. Lord Seymour's bill of 1840 provided for the appointment, by the Board of Trade, of railway inspectors, who should have the right to "remonstrate" with the companies.[2] But the law remained a dead letter, and in 1842 Gladstone brought in another bill giving the Board of Trade inspectors certain compulsory powers.[3] This law was not more successful than its predecessor, and finally, as the outcome of the great investigation of 1844, a commission was appointed within the Board of Trade and put in activity in 1845. It was known as Lord Dalhousie's Railway board, and was invested with extensive duties of examining all new projects. But although it worked hard, it discountenanced parallel roads and thus incurred the hostility of the railways and ultimately the jealousy of Parliament itself.[4] As a facetious member said, it attempted to do what five angels could not accomplish; and public opinion not coming to its rescue, it was abolished ingloriously the same year. Nothing daunted, however, the government brought in

[1] *Cf.* James Morrison, Speech in House of Commons, May 17, 1836; *id.*, The Influence of English Railway Legislation on Trade and Industry (1848), p. 86, and App., pp. 107, 158.

[2] 3 and 4 Vict. c. 97, An act for regulating railways.

[3] 5 and 6 Vict. c. 55, An act for the better regulation of railways, *etc.*

[4] *Cf.* Report on Railway Companies' Amalgamation (1872), p. vii.

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a new bill constituting the Board of Railway Commissioners, in 1846, with moderately extensive powers.[1] But the railway interest again succeeded in robbing the bill of all its vitality, so that the only function left to the new commission was "inquiry and publicity." It vegetated for five years, accomplishing practically nothing, and was quietly abolished in 1851, while all its "extensive powers" were re-transferred to the Board of Trade.

For over twenty years the commission idea slumbered. Cardwell's act of 1854, the only serious attempt at governmental regulation during the interim, left the enforcement of its provisions to the common courts, and with the customary results. It was not until 1873 that the present railway commission was finally constituted. But although its activity has been incessant and the number of cases disposed of far greater than those previously adjudged by the purely legal tribunals, it has by no means achieved an unqualified success. The manifold complaints in the late investigation of 1881–82 and the proposals now pending to reconstitute and strengthen the commission bear ample testimony to this fact. The commission is practically a court for railway cases,[2] but its efficiency has been checked in three ways. Its jurisdiction is limited, its procedure is cumbrous and expensive, and its powers of enforcing judgment are restricted. Its jurisdiction is limited, with a few unimportant exceptions,[3] to cases arising under Cardwell's act of 1854, which forbids undue preferences and requires proper facilities. The commission has endeavored to widen its powers by interpretation, as, *e.g.*, in the case of transgression of the

[1] Accounts and Papers, 1846, vol. iii, p. 277; and the bill as passed May 21, in Accounts and Papers, 1847, vol. iii.

[2] Of the three members and two assistants, one must be a jurist. In questions of fact their decision is nominally final; if they think it a question of law, then they are to "state a case" in writing, and the matter goes up to the higher court, who are either to decide it, or to give their opinion as to the law and send the case back to the commission. But as the appellate court can issue a writ of *mandamus* compelling the commission to "state a case," the decisive power does not rest with the commissioners. *Cf.* Seventh Report Railway Commission, p. 3.

[3] Such as reasonableness of terminals, enforcement of through rates, agreements with canals, *etc.* 36 and 37 Vict. c. 48, §§ 8–11, 14–17. For list of cases decided up to 1882, *cf.* Select Committee (1881), Rep., App. no. 17, pp. 68–79.

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charter maxima, but in this it has ignominiously failed.[1] Hence it cannot dispose of all complaints. Secondly, the procedure is unsatisfactory. The power of the railways is so great that the private shippers refrain from complaints for fear of reprisals. The weapons of retaliation in the hands of the companies have been ruthlessly employed.[2] But even if the shipper determines to brave the opposition of the railway, the expense is so enormous as to induce him in many cases to let the litigation drop.[3] The usefulness of the commission is thus greatly impaired. Finally, the means of enforcing judgment are sadly insufficient. The decisions of the commission refer only to the future, not to the past. Its "injunction" does not enable the complainant to recover damages. Furthermore, the companies sometimes flatly refuse to obey the decisions until finally ratified by the appellate courts, and even then they frequently contrive to evade the judgment.[4] The English corporations are far less amenable to the force of public opinion than the American. In short, although arbitrary personal discriminations are comparatively

[1] Brown *vs.* Great Western, Eighth Report Railway Commission, p. 4; App., 74–77. The high court of judicature issued a writ of prohibition against the commission. Select Committee on Railways (1882), p. 201. In Scotland it was different. Fifth Report, p. 8.

[2] "A man must be very chary in bringing an action against a railway company." Select Committee (1881), Evid. qu. 3745. A colliery company complained of overcharges, and the railway refused to transport the coal at all. Evid. (1881), pp. 138–142. A similar case arose with an iron company, and when the railway was compelled to take the goods, it sent them at such inconvenient times and added so many other vexations that the iron company was compelled to compromise. *Ibid.*, pp. 200, 237, 238. A firm in Bedford complained of exorbitant terminals, and the railway retaliated by raising the rates to Bedford more than one hundred per cent, and not to other parts of the line. *Ibid.*, p. 26. A brick and tile manufacturer complained of the rates, and the railway compelled him to prepay the charges, which were immediately raised fifty per cent. Evid. (1882), p. 220.

[3] A local board spent in one case £2500, and then abandoned the contest for lack of funds. Evid. (1881), p. 447.

[4] In a case against the Great North of Scotland the railway company was defeated after a stubborn fight, but reduced its rates only to the particular station in question and continued to make illegal charges to all the other stations. A separate suit would have been necessary in each case. Evid. (1881), p. 207. In the Neston case the overcharges were continued notwithstanding a decision by the appellate court. "There is no power to enforce obedience to the law." Evid. (1881), qu. 3094, and pp. 140 *et seq.*

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rare,[1] owing to the greater development of combination, it may well be doubted whether the railway commission has produced a state of affairs much, if at all, better than that which existed prior to its inception. The new bill of 1887 emphasizes the feeling of necessity for a much more thoroughgoing reform.

In the United States the commission idea has two independent sources — the Granger movement and the public sentiment of Massachusetts. The policy of the American commonwealths has gone through three phases: the period of state aid and partial regulation, to 1845 or 1850; the period of *laissez faire*, to 1870; the period of active governmental interference, to the present. The moderate state regulation of the first period was due to the supposed analogy between railways and canals or highways. This varied naturally with the different sections of the country — from the railways owned and managed by the state, as in Georgia and Pennsylvania, to the charter regulations of charges in New York, and the limitations of dividends in New England. When the rates were fixed, they were based on the canal and turnpike tolls. The immoderate state aid to railways, again, was due to the mania for internal improvements during the thirties and forties. The scanty legislation of this period remained in great part unenforced because of the desire and necessity of more extended means of communication, and thus the commonwealth gradually ushered in the second phase of the development, that of *laissez faire* and unlimited competition. The system of special charters was succeeded by that of general railroad laws which exacted only a few formalities.[2] Not only were the railways left to themselves, but the belief in the absolute efficacy of unalloyed competition was so strong as to lead to a logical carrying out of the theory. No parallel or competing companies were authorized to consolidate.[3]

[1] But they still occur. *Cf.* Evidence (1881), qu. 1730–1737, where one shipper was compelled to abandon business. As to allowance for quantity, see qu. 11,804 *et seq.*

[2] So in New York the law of 1848, and finally that of 1850, which permits any twenty-five persons to form a company and file its articles when $1000 per mile is subscribed and $100 actually paid in. So in Illinois in 1849, and in the other states in the following decade.

[3] The railways of course avoided these provisions through the instrumentality of leases for long periods.

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The more lines, the more competition; the more competition, the more benefits to the public — that was the theory.

The results of this policy soon became apparent. The crisis of 1857 brought disaster on the country; but other causes, like the wild-cat banks, were at work, besides the railways. Then came the war, which silenced all discussion for a time. But with the close of the war and the advent of wild railway construction in 1867, coupled with the prodigious development of the agricultural interests, the fruits of this unlimited freedom were seen. A system of the most reckless swindling and the most outrageous discriminations arose, such as has never existed before or since in any civilized society. The corporations regarded themselves as purely private money-making enterprises, and seemed not to have the faintest conception of any duties to the public. In the West the abuses were further intensified by the fact of absentee ownership,[1] so that the situation became intolerable. In response to repeated demands for redress, the railways flatly denied the right of the state to interfere with them at all. Things went from bad to worse.

It was as a protest against this attitude that the Granger movement arose. The National Grange, established in 1867 purely as a means of mutual improvement and protection for the farmers,[2] was soon drawn into the political warfare against the railroads. At first moderate in their demands, they now became extravagantly violent in word and action.[3] But while the Grangers demanded strict regulation they still believed in the saving force of competition. Failing to see that the bad results of which they complained were due to prohibition of combination, they made the prohibition still stronger. They allowed free competition between the roads, and then hoped to

[1] "The whole story is told in these two words — absentee ownership. While the Western patron was plundered, the Eastern proprietor was robbed." Report of Illinois Railroad Commission (1874), p. 17.

[2] *Cf.* Report of New Jersey Bureau of Statistics of Labor (1886), part vi; and Cloud, Monopolies and the People (1873).

[3] At the general convention at Springfield, 1873, it was resolved that the railways "have proved themselves of as arbitrary extortion and opposed to free institutions as the feudal barons of the Middle Ages." Other favorite phrases were "money-sharks" and "bloated bondholders."

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legislate away the results of free competition. Competition was still the panacea. That the railroads did not act justly was their fault; *ergo*, said the Grangers, enforce free competition and prevent by legislation the perversion of the principle. That is, they attacked the problem in just the wrong way; they permitted the cause to remain, and hoped to remove the results; and in this they necessarily failed.

The hot-bed of the movement was in Illinois, where the constitution of 1870 adopted provisions of a stringent nature. The law of 1871 forbade any discriminations at all, and after its unconstitutionality had been proved, was followed by the law of 1873 which gave the commissioners power to fix rates. Iowa, Minnesota, Michigan, Ohio, Wisconsin, followed with maximum, *pro rata*, and short-haul laws, often fixing the rates or giving the commissions absolute and mandatory powers.[1] But the crudity of the laws was shown by the haste with which they were repealed.[2] The political results of the Granger movement indeed were of inestimable importance in putting an end to the arrogant pretensions of the corporations and in producing the sweeping decisions which finally settled the power of the states to regulate its creatures.[3] But the legal question was one thing; the economic question was another. The Granger movement was economically as unwise as it was politically important and successful. The compulsory commissions were an avowed failure.

Far better results were achieved by the advisory or supervisory commissions, of which Massachusetts afforded the first and most successful example. As Charles Francis Adams himself declares, it hit upon the correct method of legislative control by what was at the time nothing but a "happy guess."[4]

[1] For these various laws (Iowa 1874, Minn. 1871, Mich. 1871, Ohio 1873, Wis. 1874), see Cullom Rep., pp. 71–74, 98–102, 109–111, 119, 135–137.

[2] Minn. 1875, Wis. 1876, Iowa 1878. In Michigan and Ohio the laws were not enforced. In Illinois the powers of the commission were not used after the decision of the Granger cases. *Cf.* my preceding article, POLITICAL SCIENCE QUARTERLY, June, 1887, pp. 245, 259.

[3] Mun *vs.* Illinois, *etc.*, 4 Otto, 113–187. Decided in 1876.

[4] Cullom Committee Rep., Test. p. 1202. *Cf.* State Railroad Commissions, published by *The Railroad Gazette*, 1883.

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Instituted in 1869 without extensive powers, it gradually concentrated the force of public opinion upon each particular abuse, and by its admirable reports, lucid explanations, and impartial decisions succeeded in producing a hitherto unheard-of harmony between the railways and the public.[1] Massachusetts still remains the chief type of advisory commissions. Many other states, and notably New York and Iowa, possess commissions of this nature, and the commissioners themselves object to any undue extension of their powers.[2] Their lack of authority and the support of a vigorous public sentiment have been the secret of their success. Even the Illinois commission, which possesses the authority to fix rates, has voluntarily adopted the Massachusetts principle of arbitration as more efficacious,[3] and the Kansas commission has made use of its discretionary power to place a very liberal interpretation on some rather stringent laws.[4] The chief instances of compulsory commissions to-day are to be found in the South. The Georgia commission promulgates from time to time a standard tariff, but it uses the authority with such wide discretion as to preserve the interests of the railways.[5] The Alabama commission possesses what is virtually the French power of *homologation*. New Hampshire is the only northern state with a compulsory commission; but the complaints were so few that the rates actually in force were accepted as the standard rates.[6]

The Interstate Commerce commission is thus in accord with the better experience of the American commonwealths, in that

[1] By ch. 338 of laws of 1885, the board was given powers to fix rates in a particular case; but it was a case of interstate commerce, and thus beyond their purview.

[2] As to New York, *cf.* Report of Railroad Com. (1884), p. 65; (1885), p. xxxiv *et seq.* As to Iowa, see Report Com. (1884), p. 43; (1885), p. 56. As to Illinois, see Report Com. (1884), Moore *vs.* Ill. Central.

[3] *Cf.* Report of its chief commissioner in Cullom Test., 734.

[4] Report Kansas Com. 1883, p. 28.

[5] Eleventh Rep. Ga. Com. (1885), p. 12; Twelfth, Thirteenth, and Fourteenth Reports (1886), p. 5.

[6] The compulsory commissions to-day are: Ga., S.C., Ala., Tenn., Miss., Cal., N.H. The advisory commissions are: Mass., N.Y., Ia., Wis., Minn., Mich., Col., Dak., Neb., Va. In Kan., Ill., Mo., and Ky., the powers are somewhat broader, but not rigidly exercised. In Conn., Me., Vt., R.I., O., the duties are mainly those of inspection.

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it is invested with only moderate powers. It may investigate any matter falling within the purview of the act, whether the complaint be made by private individual, railway, or state commission, or it may institute inquiries on its own motion without any complaint whatever. If its recommendations are not accepted by the common carrier, the circuit court, and ultimately the supreme court, is to give the final decision, the report of the commission being *prima facie* evidence of the facts. The commission thus has only discretionary, not absolute, powers; and its success will depend largely upon the character of its decisions and the possibility of concentrating public sentiment on the question at issue. Whether it will attempt, like the English commission of 1845, to do "what five angels could not accomplish," is perhaps not an entirely settled point. But it is safe to say that not even five demigods could satisfactorily adjust all the complaints arising on 150,000 miles of railroad.

Our conclusions may now be summarized. The federal law contains provisions of undoubted value. Among these the enforced publicity of tariffs and projected uniformity of accounts deserve the heartiest commendation. Nothing is more conducive to strict impartiality toward the shippers and to perfect integrity toward the owners than the consciousness of public accountability. Secrecy has ever been the father of duplicity and favoritism. No one indeed can be legislated into righteousness, but the noonday glare of open responsibility is the strongest possible preventive of gross injustice. All those sections, therefore, which demand publication of the tariffs, submission of agreements, and eventual uniformity of accounts, must be acknowledged eminently wise provisions. In like manner the institution of a commission with moderate powers to serve as a medium of this responsibility and as an interpreter of the public demands must be unqualifiedly commended. Mere legislation is impotent without a proper machinery to enforce the decrees, and reliance on the judicial branch of the government has always been found inadequate.

Of more doubtful value, however, are the clauses which

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attempt to ensure equitable charges. The definition of unjust discrimination is necessarily so vague as to be susceptible of varied interpretations. In itself it settles nothing. In so far as preferential rates are concerned, the law is guilty of a grave mistake in prohibiting pools. The crying evil of railway management to-day is personal discrimination. No mere legislative penalties will successfully abolish this. Pools are perhaps not a completely satisfactory solution of the problem; although as adjuncts to our traffic associations, they have accomplished incalculable good. They must rather be regarded as a temporary palliative, as a step in the onward march to final consolidation. But their prohibition at the present time is premature and unwise, and unnecessarily jeopardizes the success of the law. The underlying principle of pools — that of checking undue competition and ensuring uniformity of rates — will undoubtedly reappear in another form, most probably in agreements to give adequate "differentials." But these new agreements will be still more deficient in stability and coercive power than were the pools, and the ultimate outcome promises to be a more complete combination, a more thoroughgoing frustration of the competition which the law seeks to establish. Competition is the handmaid of personal discrimination.

Finally, the curtailment of local discriminations through the short-haul clause is a double-edged sword. It is intended to benefit the public, but if strictly enforced it would in many cases injure the public. As a check to arbitrary management and the systematic disregard of less favored localities, it is indeed defensible. But the important factors of water and foreign competition and long distance traffic must not be overlooked. As long as these exist, local discriminations will be absolutely necessary. The mere claim that existing business relations have been built up through the medium of differential rates and that their abolition would throw all trade into confusion, is not a sufficiently valid reason to oppose the law. For if these differential rates are unjust, even temporary distress cannot be pleaded as an excuse for continued injustice. But it has been shown that certain local discriminations are not unjust.

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Value of service as a subordinate principle justifies carefully guarded infractions of the short-haul clause. Without these infractions we would soon attain the double result of ruining the railways in favor of their water competitors and of voluntarily abdicating the advanced position which improved means of transportation have given us. Each section of the country would be separated from the rest by the strongest of mutually protective tariffs. Either the commission must frequently relax the rule, or it must so liberally construe the clause as to permit wide local discriminations in specific cases. The latter policy has fortunately been already initiated by the opinion in the Louisville and Nashville case. Otherwise it would have needed but little foresight to predict grave inconvenience to the public and a speedy repeal of the law.

The Interstate Commerce act thus contains some serious blunders in the midst of many wise provisions. But on the whole, it is a cheering sign of the determination to grapple with evident evils. To conclude that it will at once remove the chief abuses would be far too optimistic. The condition of affairs will in most respects remain very much as it was. Personal discriminations at this moment are little, if at all, less frequent than before the passage of the law, and they will not be stopped by legislative authority. The main hope for the future lies in the further elaboration of the railway federations or traffic associations, to which most of the advance thus far made is ascribable, and whose complete history, never yet told, I must reserve for another time and place. Their importance, both past and present, has been phenomenally neglected. But the value of the Interstate Commerce law lies in the fact that it for the first time in our history subjects the railways to national supervision, and that it is designed to enforce a publicity and responsibility which are the prerequisites to all healthy reform. The federal law is a tentative step, but a step in the right direction. It embodies the expression of a principle which is destined to remain and which is capable of a fruitful development. On this account it deserves a hearty welcome.

EDWIN R. A. SELIGMAN.

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FERDINAND LASSALLE.

SINCE Lassalle's death in the year 1864, he has been recognized as the creator of a new social faith; and as German socialism, this new faith, has already reached our shores in no inconsiderable strength, it is probable that the Americans will be forced, as the Germans have been, to take some account of Lassalle's mission. And apart from its social significance, the study of this mission will not be devoid of interest. There has probably been no more interesting appearance in the later political history of Germany than Lassalle's — no character that has secured more completely the attention of its world. There may be and there are many difficulties in the way of accepting Lassalle's political creed, but he had sufficient breadth and strength to win a secure place in the two widely separated domains of German science and politics and to profoundly influence the leading spirits of his time. Bismarck even has been called a disciple of Lassalle. At the University of Berlin, when only a student, he was the intimate friend of Boeckh and Humboldt, and could boast in after years, when accused of half-knowledge, that he had at his command the whole culture of his age. While at the university he finished the greater part of an exhaustive work on "Heraclitus the Dark," a work which, as he says, forced the recognition of the "guild of science" (*Zunft der Wissenschaft*) by that compulsion which lies in the individual and the real; and afterwards in quite a different department, in his "System of Vested Rights" (*System der erworbenen Rechte*), he exhibited such a mastery of the subject that he again compelled the recognition of the "guild" — compelled in a measure its approbation of his most revolutionary work.

In addition to his worth in the department of science Lassalle was also a man of affairs, a practical politician, and — however large an element of the actor and sophist there may have been

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in him — the greatest German orator since Luther and John Tauler. Besides this, he was naturally heroic, as beautiful in person as Goethe; and when we remember that he was crossed in love and met in consequence with a romantic death at the age of thirty-nine, we see at once, as the publicist de Laveleye has suggested, the making of a story like that of Abelard.

Lassalle has been the poetry of the various accounts of contemporary socialism, and has already created a literature which is still growing almost with the rapidity of the Goethe literature.

The estimate of Lassalle's worth has been in each account naturally influenced by the economical or sentimental standpoint of the writer. To de Laveleye, who takes so much interest in socialism, Lassalle was a handsome agitator, whose merit lies chiefly in his work as interpreter of Karl Marx. To Montefiore he was a man of science who was led by accident into politics; and Franz Mehring, who was once the follower of Lassalle, in his *Geschichte der deutschen Social-Demokratie*, discusses his career in the intolerant mood in which one generally approaches a forsaken worship. The Englishman John Rae, on the contrary, in his account of socialism, makes Lassalle a hero; and in the narrative of the talented Dane, Georg Brandes, Lassalle is already on the broad road to his place as a god. In the same spirit Rudolf Meyer in his work "The Fourth Estate's Struggle for Emancipation," does not hesitate to use the cheap hyperbole of our modern writers, and compares Lassalle with Jesus of Nazareth. Heine also, who saw in his fellow Israelite that perfect Hegelian "freedom from God" which he himself had attempted in vain, hails Lassalle as the "Messiah of the age." Among Lassalle's more immediate disciples this deification seems to have become a formal *cultus*, and it is affirmed, hard as one finds it to believe the story, that after Lassalle's death he became an object of worship with the German laborers. They expected that after the fashion of Frederic Barbarossa in the old legend he would come again and emancipate the proletariat; and though this new religion has now gone the way of all more recent religions, the name of Lassalle is

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still a sacred one among the German socialists. They see in him, as the Irish saw in Dean Swift, only a champion of the oppressed, and are slow to inquire what circumstances may have thrust this role upon him.

The father of Lassalle was a Jewish merchant in Breslau, where the future "fighter and thinker," as Boeckh wrote mournfully over his tomb, was born on the 11th of April, 1825. The Israelite Lassal, for so the family name is still written, was a wealthy wholesale dealer in cloth, and with a consciousness of the good in such an avocation had from the first intended that Ferdinand should be a merchant, just as Heine's mother had intended her son for a banker. Ferdinand was sent to a commercial school in Leipzig as the preparation for a mercantile career. But this was not his destiny. His tastes were so strong in other directions that he returned already determined on another mode of life. Naturally the father objected, but the conflict between his wishes and those of his son was of brief duration and soon ended in a victory for Ferdinand. The first feature in Lassalle was his will, the source of his strength and his ruin, and one can find no period in his life when this will seemed in the least capable of compromise or submission. At fifteen Ferdinand was master in the Lassal family, and was in the habit at that age, it is said, of having the final word in any dispute that might arise among its members; and so, when he decided to become a Christian and a philosopher instead of a merchant, the family had nothing to do but to accommodate themselves as best they could to this arrangement. They allowed the young Lassalle to be baptized, and then furnished him with the money to continue at Berlin those philosophical studies which he had already begun in Breslau.

To the university Lassalle went as a Christian Jew, and began to seek for something that might give rest to his striving spirit, as he had not obtained this on his baptism into the Christian faith. Lassalle had already arrived at great proficiency in the languages, and in his speculative thought was led towards Hegel, as this was the day of Hegel

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in Germany. It was as a Hegelian that he saw a deeper significance in the old Ionian, the cynical and mysterious Heraclitus, and at this time conceived the idea of a monograph on Heraclitus. In order to collect the various fragments of his philosophy, Lassalle, on the completion of his university course, went to Paris, and while there met Heine, a moment of no little interest in his life. The poet was then at the entrance of his last miserable years. He was also in great trouble with his financial affairs, and Lassalle's visit came at the right time. He rendered Heine some very valuable assistance, and won his extravagant favor and admiration. "Herr Lassalle," he wrote to his friend Varnhagen von Ense, "is a young man of the most distinguished mental endowments: with the most thorough scholarship, with the most extensive knowledge, with the greatest critical acumen, with the richest gift of utterance, he unites an energy of will and a capacity in action which will astonish you." Heine was above all impressed with Lassalle's self-reliance and egotism, and proclaimed him a true child of the new era, with none of that self-renunciation and modesty which the rest of the world professed with more or less hypocrisy. There was something very significant in the meeting and mutual recognition of these two emancipated Israelites, and Lassalle returned to Berlin no doubt with a clearer conception of his mission. His intention then was to remain at the university as *Privatdocent*, as there was so much to attract him in Berlin, that great modern centre of the world's thought and action. On his arrival there, Lassalle through his talents and pleasing address soon became a well-known person. Under the patronage of Boeckh and Humboldt, whose acquaintance he had made before this, he continued his work on Heraclitus, and there opened before him a brilliant career as a German professor; but, as fate would have it, before he could finish his book he was to be led away entirely from such work. Lassalle met about this time (1845) the Countess von Hatzfeldt, a beautiful and imposing woman who had been deeply wronged by her husband, the Count von Hatzfeldt, and was then

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endeavoring in vain to obtain a divorce from him. The count had lavished the inheritance of the long-suffering countess on his mistresses, and with the selfishness and corruption of the common *roué*, refused her a divorce on no other grounds than the division of property which this might occasion. The countess was then twenty years older than Lassalle, and although her own family for some reason had declined to take her part, Lassalle was so moved by the countess's wrongs, that, like a second Lohengrin, he made her cause his and began this famous and eventful episode in his life by challenging the count. The affair was, however, not destined to so simple a termination. The count, who was an aristocrat of the old school, had no mind for a duel with the son of a Jewish merchant, and on Lassalle's appearance in the palace had the "young Jewish upstart" shown to the door. A keener insult could not have been inflicted upon one of Lassalle's spirit, and from this moment he had the spur of a personal motive. He was only twenty, and was a philosopher rather than an advocate, but with that capacity in action of which Heine speaks, he assumed the whole conduct of the countess's divorce suit. Lassalle at its commencement had probably very little idea how much this undertaking would cost him, for his task soon became like that of the Norse hero who found himself casting the battle-axe against a god in disguise. The suit refused to arrive at any conclusion; Lassalle carried it before *thirty-six* courts, and at the end of the *eighth* year from its commencement no final decision had been reached. But the count had now become thoroughly tired and possibly also frightened by the terrible persistence of "the young Jewish upstart." He agreed to a compromise and allowed the countess a substantial fortune. Lassalle also was not to go without a reward for his heroic assistance. The countess had lived during the eight years of the suit chiefly upon the allowance Lassalle received from Breslau, and now, at the close, according to a compact between them, the countess settled upon Lassalle an annuity which was to relieve him from all further care as to money.

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The motive of Lassalle in his career as the countess's knight there is no need to doubt was a heroic one. He had then at least a deep feeling for those high things, as Heine says, —

> Die zwar Verstand und Prosa achten g'ringe,
> Fur die Jedoch die Edlen, Schönen, Guten
> Auf dieser Erde schwärmen, leiden, bluten.

And as a change from the wise man whom a sense of his importance to humanity at large would preserve from such a folly, this self-forgetfulness affords a certain relief — like the conduct of those sturdy old Germans, Luther and Fichte, in risking the world-apostles of the universal *Ich* and the doctrine of justification by faith on a few plague patients. But if there is much to admire in Lassalle's unconsciousness of the "greater good" which he might eventually have done by a less unselfish course, and even in his lack of that enormous "world-love" which would have made it a crime to sacrifice the grand and remote interests of mankind at the demand of a mere individual sorrow, — at the same time it cannot be denied that this episode in Lassalle's life was one that gave an evil trend to his course in the world. For eight years now he had gone directly away from his old goal. His work on Heraclitus had lain neglected during the whole of this time; and though he now returned and finished it, he was with this work to bid farewell to the ancients. He had passed that period when such work could have a sufficient interest for him. From the nature of his part in the divorce suit he had also developed in other directions. He had become for one thing, through the necessity of his role as an advocate, a great orator, and he could not so easily yield the intoxicating applause which the orator receives for the more critical commendations of the "guild of science." Then, too, his mode of life had now become one which is hardly considered favorable to a study of philosophy, as the philosopher is under the same necessity as the priest of keeping himself "unspotted from the world." There was now, since the Countess Hatzfeldt had become Lassalle's constant companion, an apparent justification of the evil rumor which had been abroad from the beginning; and this with his

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often dissolute manner of life — his *Genusssucht*, as the Germans call it — would in the end have kept him from a very lasting fame as a philosopher.

On the publication of his Heraclitus Lassalle was elected a member of the Philosophical Society in Berlin, and shortly after his election was appointed to deliver the oration in honor of Fichte. We can see in this oration the change in Lassalle — how thoroughly political his interests have in the meantime become. He uses still the language of his audience of scientists, but we discern already more than one trace of the future agitator and revolutionist.

A revolutionist Lassalle was destined to be from the very circumstances of his birth. He was a Jew; and the race of emancipated Jews, from Paul to Spinoza, have not been the most conservative of mankind. They have made very poor terms with the world as they have found it; and it is not difficult to understand how with this oriental tendency to extremes the German Jew who has received the new thought should wish to apply the great radical ideas of Fichte and Schelling and Hegel to the government. And then, too, the Jew in Europe, after his long sacrifice to the ignorant, inhuman fantasy that he was responsible for the death of Jesus of Nazareth, cannot have that "praiseworthy attitude towards the gods" which Aristotle notes in the successful, nor that conservatism which comes from being at the top of the existing order. As a Disraeli or Julius Stahl, he may forget in the hope of personal advancement the old, immortal race-sorrow of Israel, and he may figure as Disraeli and Stahl have done as a supporter of the aristocracy or of the royal prerogative; but if he wishes to be other than a Jesuit, to be a man among men and to strive for a higher social order, this will be impossible. He will detect at once the defects in the existing order, and these will be associated in his mind not so much with the national glory as with his persecution, — with the names of Fettmilch and Dr. Stoecker rather than with those of Luther and the great Frederic. So long as Lassalle was an Israelite, even though a baptized Israelite, his political sympathies must have been with the oppressed. That

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amiable and reconciling glance which von Ranke, the historian of the aristocracy, casts on human history would be clearly impossible for Lassalle. We are not surprised to find his views from the beginning of the most radical kind; and as these developed and the life of a teacher of philosophy became impossible to him, it was natural for one of his strength and in the prime of those first mighty years to conceive that he had a radical mission on the earth and in this conceit to attempt a grand part. This mission seems early to have dawned upon Lassalle, and his excuse for the eight years which he served for the Countess Hatzfeldt was that he saw in her misfortune the whole "*misère* of the age." He wished to embrace it also in what he called his life-work, — "science and the laborer," — and in the midst of the tedious and exhausting divorce suit he was by no means a merely passive spectator of the political revolution then either making ready or fully under way about him, but gave it all the assistance in his power. He belonged then to the circle of political free-thinkers, the young Hegelians Engels, Schapper, Freiligrath, and Wolff, who had collected about Karl Marx and were publishing amongst them that ill-starred journal, the *Neue Rheinische Zeitung*. Lassalle was a regular contributor to this paper, and when the revolution of 1848 occurred he endeavored to incite the laborers in Düsseldorf, whither he had gone with the Countess Hatzfeldt, to revolt against the government. He was arrested and thrown into prison, and on May 3, 1849, the young revolutionist was tried on the charge of stirring up the citizens to armed revolt against the government. Lassalle's defence on this occasion was of a very high order of eloquence. "I confess to you," with continual joy he declared before his judges, "that I am according to my inner conviction the decided friend of a social-democratic republic." Lassalle was acquitted, but was not released, and was afterwards sentenced to imprisonment for six months on the charge of "inciting the citizens to resistance against the officers." Lassalle went cheerfully to prison, whence, like Beaumarchais in his affair with the Count de la Blache, he still conducted the divorce suit. He would not tolerate any effort on

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the part of his friends to obtain his release: he declined Humboldt's offer to intercede with the king for him, and publicly disclaimed the petition of his sister to the Prussian court for his pardon. So active a part in the revolution of 1848 was not favorable to a successful political career in the Prussia of that day at least, and on Lassalle's release and the termination of the suit his occupation seemed for the moment to be gone. His residence in Düsseldorf with the Countess Hatzfeldt — of whom he was becoming heartily tired — now became unendurable, and though he was banished from Berlin, the attractions there were too strong. He made his way into the city disguised as a wagoner, and was finally, on Humboldt's intercession, allowed to assume his proper shape and to remain.

There followed now a period of literary activity. Lassalle completed and published his Heraclitus, as we have seen, and while at Düsseldorf he had nearly completed a drama, — *Franz von Sickengen*, — a drama as didactic as *Nathan der Weise*, and of little artistic worth. Lassalle was no poet. Of quite a different order was his "System of Vested Rights," which appeared about this time, and which, though unfinished, was to remain a memorial of Lassalle's diligence and strength, even if the argument fails at many points to convince us.

While engaged with his literary work, Lassalle still had time for other things. His eloquence and his fine dinners had restored him to favor in Berlin circles, and he had again become one of the famous personalities of the capital. Although the Countess Hatzfeldt, as all predicted that she would, had followed him to Berlin, and figured as nearly as her sex permitted in the capacity of his old man of the sea, Lassalle, with his pale, beautiful face and black hair, soon became too general a favorite with *les grandes dames* of Berlin to give his undivided attention to the countess. His success, indeed, in other affairs of the heart was so great that it excited the jealousy of certain young noblemen, and to such an extent that they finally discovered some grounds for sending Lassalle a challenge. This Lassalle declined, on the ground that duelling was unbecoming in a Social Democrat. The reason given was the real reason, for

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cowardice was certainly not one of Lassalle's traits; and when the two young men thus disappointed shortly afterwards waylaid Lassalle and fiercely assaulted him as he was walking in the Zoölogical Gardens, the Social Democrat drubbed them both so soundly with his cane that they had to take to their heels. Lassalle's bravery in this adventure was everywhere admired; and the historian Förster gave him Robespierre's stick, which he is reported to have carried with him ever after.

Merely literary and social life could not, however, satisfy Lassalle, and he was soon engaged again in a political agitation. Before writing the "System of Vested Rights," he had, on the fall of the Manteuffel ministry, offered the government a suggestion upon the Italian affair of that time (1859). But though this suggestion was very patriotic, and his pamphlet, "The Italian War and the Problem before Prussia" (*Der italienische Krieg und die Aufgabe Preussens*), contained ideas which Bismarck, who was Lassalle's personal friend, afterwards realized, the government had nothing for the revolutionist. Lassalle then attempted to co-operate with the Liberals, but this too was attended with difficulties. The leaders here were jealous of him, or at least distrusted him, and Lassalle left the party with a savage attack on *Julian Schmidt, der Literar-Historiker*, — although Schmidt's history of German literature, which Lassalle criticised in so vindictive a spirit, was not, one is inclined to think, so offensive as Schmidt's position among the Liberals.[1] Disgusted with these, Lassalle drew near for a moment to the Conservatives, and was accused — not for the last time — of being the friend of absolutism. But Lassalle was to remain true to the class he had led at Düsseldorf, and shortly after this, with an address before a labor club in Berlin, he began his formal career as a Social Democrat.

Lassalle, like Marx and Rodbertus, had, as we must believe, a deep sympathy with the suffering poor — with the proletariat; and the least knowledge of the actual condition of

[1] The history was nevertheless full of incomprehensible mistakes, as Lassalle has shown, and is written in the same uncivil partisan spirit as the same author's so-called History of Modern French Literature.

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this class at that time may very easily account for his sympathy, and may indicate what a temptation it must have been to an adventurous politician to reveal to them their condition. The same causes were in operation then as now to give the laboring class its enigmatical character. On the destruction of the feudal system in the French revolution, the masses of the people had been freed from any other authority than that of the state, but they had been forced in the blind struggle for existence into a servitude worse than the old. A caste as severe as the feudal caste had arisen with the increase of luxury, and the accumulation of the money in the hands of a few had created a hungry and miserable class, doomed, as it seemed, to hopeless want. The peasant, awakened by the new sense of human worth from the long dream-life of the middle ages, had, with great hopes of a higher and more enjoyable existence, pressed into Paris and Berlin to find himself once more a slave. Especially true was this of the German peasant. The German people have in general suffered more than the people of any other country in Europe. They had from the beginning of the whole long history of the empire to bear the chief burden of each political imposition and mistake. The state, where it could be said that there was a state, had not been able to protect them from the unwholesome despotism of each petty prince who was endeavoring to ape the magnificence of the Bourbon court. The masses of the people had suffered indescribably during the Thirty Years' war, and, though in another form, almost as much in the dreary, stifling period that followed in its wake.

The thought and the realization of personal freedom came to the greater part of the civilized world more rapidly than to the German. Long after the French peasantry was free, the German Fritz and August were still creeping barefooted about their master's castle. Although much of the glamour had vanished from the privileged class since its humiliation by Napoleon, the peasant still had much of the old reverence for it; and the laborer under the rule of the new class, — the *bourgeoisie*, — however much he might despise his master, was, even after the revolution of 1848, the victim of a commercial feudalism as

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oppressive as the old, but devoid of all heroic, poetic features. We may appreciate the condition of the German laborer when we remember that as late as 1866 universal suffrage had no real existence in Germany,[1] and that the laborer condemned to endless toil under the old *régime* had no voice in the government. At the beginning of Lassalle's agitation universal suffrage, as Mehring says, had been declared a dead issue (*ein überwundener Standpunkt*); and the Liberal party, in its contest with the crown, coquetting with the laboring class, proposed as a substitute for universal suffrage to receive the laborers into the Liberal party as "honorary members." The laborers, however, appreciated very poorly this generous offer. They were not satisfied with being merely honorary members of the Liberal party, when the grand, optimistic mood of the French revolution with its dream of equality was still upon the world. In the year 1862 there was a general dissatisfaction among the laborers. It was a day of labor clubs and congresses, and the various grievances were discussed in an ample way; but just how to better their condition and to refuse with any show of courtesy and good sense the propositions of the Liberal party no one knew. In the general confusion the workingmen of Leipzig remembered Lassalle's part in the revolution of 1848, and invited him to address a labor congress in that city. Lassalle had just before this been sentenced to six months in prison for an eloquent harangue before the Berlin laborers on "The Present Historical Period and the Working Class." The invitation found him in a sympathetic frame, and his "Open Letter in Reply" (*Offenes Antwortschreiben*) brought down upon him the concentrated wrath of Liberals and Conservatives, and made the beginning of German Social Democracy. Against the advice of his most intimate friends, Lassalle advised the laborers to agitate for universal suffrage and to demand assistance from the government in forming

[1] [Every adult Prussian had then, as he has now, the right of suffrage; but the election of deputies in Prussia was then, as it is now, indirect; and the "three-class system" gave then, as now, a preponderant influence to the wealthier minority of the people. In the North German confederation and in the new empire, on the other hand, — *i.e.*, since 1866, — all elections have from the first been direct, and the vote of the laborer counts for as much as that of the millionnaire. ED.]

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co-operative associations. The Liberals and Conservatives in the Germany of 1863 allowed themselves to be deeply wounded by this proposition to arm the proletariat with real political power. The Liberal press attacked Lassalle furiously, the most of his old friends deserted him, and even Rodbertus, in some respects the forerunner of Lassalle and Marx in the development of German socialism, was frightened at the thought of giving the laborer political significance. So general, indeed, was the aversion to Lassalle's scheme that nothing short of its general acceptance on the part of the laboring man could keep him from a ridiculous failure, and under this compulsion Lassalle took the field with his message to the proletariat.

What was this message? New, it certainly was not.[1] Louis Blanc had been the advocate of co-operative associations before Lassalle, and had been the victim of a French Herr Wackernagel; many of Lassalle's ideas are justly claimed by Marx[2] as his; and Marx and Lassalle both, notwithstanding their revolt from its theory as to state interference, are in close dependence on the Manchester school. The economical movement which Adam Smith began has taken in Ricardo, John Stuart Mill, and other of Adam Smith's followers too universal and thorough a form for new economists to go far out of its track even if they would. The watchword of Lassalle, "the cruel iron law of wages," — that the average wages of labor generally remain reduced to the bare amount necessary to sustain life, — was undoubtedly the discovery of Adam Smith and his school. This discovery Lassalle makes in each instance his starting point. It is the burden of his *Offenes Antwortschreiben* and of his speeches. He insists, throughout the whole course of his agitation, that the wages of the laborer are, as a rule, never more than sufficient for the continuation of existence, and that this is the

[1] Lassalle, as Mehring observes, never appeals in his agitation to the System of Vested Rights, because this was too radical for his role as a practical politician. For the prominent features of Lassalle's social and economical views, consult before all his *Arbeiterlesebuch* (an amplification of the *Offenes Antwortschreiben*), *Herr Bastiat Schulze von Delitzsch*, and his speech at Berlin in 1862, *Der specielle Zusammenhang der gegenwärtigen Geschichtsperiode mit der Idee des Arbeiterstandes.*

[2] Karl Marx, Das Kapital. (Footnote to the Introduction.)

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point about which they move in the variations of each period without ever rising much above or falling much below this point. This is "*das grausame eherne Gesetz*"; and "this cruel iron law," writes Lassalle to the workingmen of Leipzig, "you must let sink deep into your souls." This iron law is to be the shibboleth of the new movement.

I can give you and the whole labor world [continues Lassalle to the workingmen of Leipzig] an infallible way of escaping, once for all, out of delusions and bad leadership. When any one talks to you about bettering the condition of the laboring classes, put to him before everything else the question whether he recognizes this law or not; and if he does not recognize it, you must say at once that this man either wants to deceive you, or is most pitiably ignorant of the science of political economy. And if now the one who talks to you of the condition of the laboring man recognizes this law, ask him farther how he is going to change it; and if he doesn't know how to reply to this, quietly turn your back on him. He is either an empty prattler who wants to deceive you or himself, or wants to blind you with hollow phrases.

After Adam Smith, as he understood him, Lassalle makes labor the single measure of value in exchange.[1] A commodity's value in exchange represents so much abstract human labor, and its worth is determined by the cost of its production. As so much average social labor it is a value. Thus labor is a creator of all value, and Lassalle holds that its rightful wages are in the product of labor, and on this he bases his assertion that the laborer, instead of receiving merely enough to sustain life, should receive all that he produces. To effect this the state must interpose and adjust the relations between capital and labor by the creation of co-operative associations after the order of Louis Blanc's national workshops. The laborer would thus produce for himself, and would become his own contractor. This Lassalle claimed is the only peaceful, legal solution of the proletarian problem.

[1] "Labor was the first price, the original purchase money that was paid for all things. It was not by gold or by silver, but by labor, that all the wealth of the world was originally purchased; and its value to those who possess it, and who want to exchange it for some new productions, is precisely equal to the quantity of labor which it can enable them to purchase or command." Wealth of Nations, Prices of Commodities, ch. v.

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So far Adam Smith may be considered historically the starting-point of German socialism. But at the same time socialism owes its strength and consistency to another source. Lassalle and his *confrère* Marx bring to the development of Adam Smith's ideas a wide culture and an insight into history which from the limitations of British thought have been impossible for the greatest representatives of the Manchester school. Adam Smith was a thoroughly practical nature, the most proper founder of the "dismal science"; and though he leaves more than one trace of a suffering heart between his apparently cold lines, he was in philosophy a cautious, skeptical Scotchman in thorough bondage to the world as it was. He was the friend and disciple of David Hume, the founder of the shrewd, superficial positivism of to-day. Lassalle and Marx, on the other hand, had felt the influence of Hegel; and though Hegel is now a name displeasing in Germany, his philosophy had at that time intoxicated the German world like a new religion, and it was inevitable that two such spirits as Lassalle and Marx should have been reached by its enormous, if obscure force, — inevitable that the dry, blind facts which the Manchester school had revealed should appear to them in a deep historical connection, and that, to the "world-glance" of the Hegelian, life should have a deeper significance than to such a bland, easy-going skeptic as Smith was. It was through Hegel that the idea which has given socialism its fascination for the speculative German mind appeared, — the idea of an impending historical development in which the rule of a single class should yield to the rule of all. This radical conception of government, this prophecy of a more universal freedom than had yet been known, lay intentionally buried in Hegel's mysterious cabala. But there is nothing like the contagion of a great idea, and although it may go for years disguised and hidden by reason of the evil days on which it has fallen, or by reason of its author's intentional concealment, we shall see it eventually storming about the world as a faith for which men live and die. It was by his fortunate interpretation of Hegel rather than by his fusion of Adam Smith and Louis

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Blanc that Lassalle called a new social party into existence and filled it with an inextinguishable hope. The constitution of a state, Hegel declared,[1] is something that must be considered divine and permanent, and not something which is made. The end of a philosophy of government is not to teach. For this philosophy comes too late. As the "thought of the world," it appears only at the completion of all things, when indeed human destiny has been fulfilled and the end is at hand. "The owl of Minerva," to use Hegel's Sibylline words, "takes wing only at the on-coming dusk" ("beginnt erst mit der einbrechenden Dämmerung ihren Flug"). And with the conservative purpose of not teaching, of merely creeping after the reality, Hegel perfected his philosophy of government, — and to it we owe Lassalle and Karl Marx! Outward events — the French revolution and the struggle of the age in every domain of life for freedom — in conjunction with that sense of freedom at which he had arrived in the depths of his own spirit, led Hegel to make freedom the end and aspiration of the world. He interpreted the whole of human history as a struggle after freedom, and in the perfect state each individual is to be free. No "free *Ich*" is to be made a beast of burden. This ideal, Hegel declared, had not been realized at all among the Oriental nations, where the form of government was only a step removed from the patriarchal theocratic form, and had been realized but imperfectly among the Greeks and Romans, where only some were free. To realize this ideal had been left to the German race, as this comes last into its kingdom.

In the year 1845, such a conception of government must have been very dangerous to the Prussian state, in which the majority of the people were still in bondage to a single class, and to old feudal ideas which the state considered it a problem of its own existence to preserve. It was a conception which, coming as it did in the heart of so intoxicating a philosophy, must in the end have brought forth its fruits. Hegel, the orthodox and conservative, was hardly consigned to his grave, when in one department Strauss and Feuerbach, and in another Lassalle,

[1] Grundlinien der Philosophie des Rechts.

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Marx, and Arnold Ruge, had revealed the radical character of his philosophy. The state was to be reconstructed, and the existing order overturned; and all this not because it could have been other than it was, but because the time had come for it to be changed. Intoxicated with the idea of development, these Hegelians of the extreme left saw in every labor trouble, in every movement of the proletariat, not a mere class-struggle, but the travail of the state in the birth of a new order. The laborer was taught to believe that his discontent did not arise so much from bad pay and bad food, as from the impulsion of an eternal principle of development working in and through him and constraining his class, which embraced ninety-six per cent of the population, to capture the state and to make it an institution representing the whole of mankind.

The most interesting feature in Lassalle's work was his effort to fill the minds of the German laborers with this disturbing idea. His plan as to co-operative associations and his "cruel iron law" were not so near to his heart as this. It was the inspiration of all his speeches, and it was his grand hope that this idea would finally make its way into the mind of the people. All his efforts were in this direction. His first care was to emphasize this historical feature of the new socialism — to explain to the workingman his place in history. The laborer was to understand that the whole history of Europe had been that of a progress towards freedom, first in the emancipation of one class and then of another. In this class-struggle the so-called *bourgeoisie*, the third estate, had already been freed from the old feudal rule, and next in the due order of development was to come the fourth class — the laboring class. The ruling principle in the middle ages was the possession of land; it is now capital; in the future it is to be labor. So filled was Lassalle with this idea that he could see in the French revolution itself only the triumph of a single class, of the *bourgeoisie*. This class, under the pretence of championing human rights, had decoyed the fourth estate to its aid; human rights were declared, and it seemed as if with the emancipation of the third estate all privileged classes would be destroyed and would van-

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ish in the universal freedom of mankind. But the events since had shown that the French revolution was not the triumph of a class that was to live by its own labor. The *bourgeoisie* had come into power and had made its element, capital, the ruling principle in all social affairs.

This rule of the *bourgeoisie*, of wealth, Lassalle contends must soon end. Society is even now in the midst of another development in which, by some mysterious strength, the fourth estate is to be lifted into freedom and authority. Already in the year 1848 the dawn of a new historical period was visible in the revolution of February 24 in France, "that land in whose mighty inner struggles the triumphs and reverses of freedom are the triumphs and reverses of all mankind." Manhood suffrage was secured and the first step taken towards the triumph of the fourth estate — the last grand step in the emancipation of humanity. The fourth estate has in its folds no germ of a new privileged class; as ninety-six per cent of the whole human race, its freedom is to be the freedom of all and its rule the rule of all. The struggle of the fourth estate for supremacy is thus a great ethical movement instead of a dangerous and immoral one — a great ethical movement in contrast with the over-conservatism of the ruling class, which forces it to put itself daily in opposition to the truth, and which leads it finally to a thorough hatred of all ideal strivings, to a compassionate laughter even, so often as the great name of the idea is pronounced, and to a deep lack of feeling for anything else except mere selfish advantages. On the other hand, a conflict between progress and personal interest is fortunately wanting in the laboring class. Its effort to better its condition, its struggle for emancipation, so far from making it selfish, will only make its cause one with that of culture and of progress; and this struggle, Lassalle insists, is something more in our age than a mere class-struggle. It is a struggle for the most universal ends, "the trembling pulse-beat of history itself," and not until this battle is won can the state attain to the true Hegelian idea of a state and arrive at its final, moral goal.

It would be impossible, in so brief an account of Lassalle, to

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narrate in detail his effort to make this dream that of the German laborer; and I must confess that the task would not be entirely pleasant. However grand Lassalle's conception of the new order and however firm his belief in its possibility and even inevitableness, his labor agitation, with the Countess Hatzfeldt in the background, and through such elect spirits as Vahlteich and Bebel, does not give one the idea of a great ethical movement destined, as Lassalle claimed, to introduce an amount of "happiness, culture, well-being and freedom without example in the history of the world." Sublime as was this Hegelian conception of government, there was much that was fantastical and even demagogical in Lassalle's presentation of it; and though his agitation has since assumed an immense historical importance, so far from having the certainty and joy of a new ethical movement, it bears all the traces of that tragic confusion in which Lassalle's life went out. Lassalle was sure that at the end of the first year of agitation he would control at least one hundred thousand laborers. To become the absolute chief of a whole laboring population, and with this prodigious force to constrain a tyrannical, inaccessible world to accept your terms, was a bait with which Mephisto might tempt a Faust out from his cell into the sphere of earthly endeavor. Ambition, "that last infirmity of noble minds," was a living flame with Lassalle; and then, too, he was a man of action. Since the revolution of 1848 he had been drooping like a wounded eagle in Berlin. He longed to use his wings again. He had an undeniable feeling for the laboring class, for the "poor silly millions," as Marx called them; and from his height of science an unspeakable hatred for his opponents, such creeping spirits as Herr Schulze and Herr Wackernagel, who were busy in tricking out a low party interest in scientific phrases. Lassalle would at any rate shake once more his "old revolutionary mane." If the laborer was not ripe for his movement, Lassalle, as he confessed, would be a "dead man"; but there was something in him that overcame the fear of death. The odds were fearfully against him. The impending historical development which he preached was to begin with a fiction.

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His task was to create a complete class-illusion; and this, like other prophets who have influenced the course of the world, with a secret element of unbelief in his own soul. Lassalle, however, threw himself into the undertaking with desperate ardor. He made speeches of burning eloquence at Leipzig, Cologne, Düsseldorf, and in the other principal German cities; and by the applause that followed his electric words it seemed at one time as if he were indeed to capture the labor world. He could refuse the proposition of the doubting apostle Vahlteich that they should announce during the canvass a larger number of converts than they had really made, and his assurance was contagious. There arose a general panic in Germany. The Conservative and Liberal press was doubly alarmed, and many thought that they were at the beginning of a revolution. There was no love lost, as one can well image, between Lassalle and the Conservatives. They hated him because in their estimation he was an ambitious demagogue who wished to rise on the ignorance and folly of the masses; and he hated them because to him they embodied that temporizing half-policy and that carnal satisfaction with the world which are so intolerable to the seer or the revolutionist. They put into use more than one ignoble method of calumny and misrepresentation to silence "the terrible Jew"; and Lassalle attacked them in the controversial style of Milton and Claudius Salmatius. Lassalle was a true Israelite, and his enemies were always the enemies of Jehovah. Herr Schulze, an economist who before this had been founding co-operative associations on the harmless principle of self-help, now found his craft in danger, and "viewed with pain" the dangerous ideas of Lassalle, a half-educated person. Lassalle answered with the proud boast that he had at his command the whole culture of his age, and inflicted in his turn a barbarous chastisement on Herr Schulze. Herr Wirth and Herr Wackernagel attempted to put Lassalle down by a plain lie; they represented his position as exactly the opposite of what it was; and Lassalle turned on them, if not with the moral earnestness of Demosthenes, with something very nearly akin to his passion and to his *abandon* in the use of epithets. "The lie is a Euro-

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pean power," cried Lassalle; and he was determined "to beat down to the ground" this Herr Wirth who came pressing in between him and the people. Every great reformer must be uncivil (*grob*), and Lassalle could be *grob* towards Herr Wirth with no fear of retaliation, because if Herr Wirth should call him a brainless bungler, as Lassalle did Herr Wirth, there would be only a prodigious laughter among all men of science. And so Herr Wirth is not only a brainless bungler, but a mere "hired scribbler," and Herr Wackernagel an "arch-falsifier, who heaps lie on lie."

With such spirit Lassalle's canvass began, and at first he seemed to be carrying the world with him. He was received in the most gratifying way by some of the principal labor clubs of Germany, and on this high tide of success a General Labor Organization was formed for the purposes of propaganda. Of this Lassalle, with much fear that he would not accept, was elected president for five years. Lassalle, as Robespierre's stick suggested, generally had some reformer of the tragic, revolutionary type before his mind; and during the debate over his term of office sat in dark silence, with folded arms and hat on. He could see at that moment only a very small distance between his idea and its realization. But, alas for these grand dreams! he was never to have the triumph of the Gracchi, or of Cleon, or of Richard Cobden; and the dawn of that world-historical sunrise which he announced with the fervor of a Hebrew prophet in his address before the Berlin labor club at the commencement of his agitation was still remote. By degrees Lassalle himself began to realize that he must fail, and the public began to observe that its alarm over his agitation was in the main a groundless one. Lassalle's speeches had been heard often with wild applause by the laborers, but they had not made converts. They were good enough as speeches, and though frequently coarse and even obscene they were never weak or childish; we hear everywhere in them the tread of a giant, even if of a blind giant, and often in the better parts, when the higher side of Lassalle's nature comes uppermost, they have a large, ideal ring that reminds one of Rousseau and the Giron-

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dists. The speeches are the best of the kind in the oratorical literature of Germany, and with Lassalle's grand voice and spirit behind them they almost invariably swept his audience with him; but his ideas were new, and the impression they made not definite enough to produce action. He was under the necessity of having local interpreters who could bring the clubs over to his views, and he was met here by endless difficulties. There were few such apostles as Bernhard Becker, who converted a whole club at Frankfort-on-the-Main to the new faith, and the local interpreter was generally some such fanatical doctrinaire as Vahlteich or Bebel, with alarming contributions of his own to the new faith. With such instruments as these Lassalle had to work on the German masses, and the task was a dreadful one. It would have been a dreadful one even with all of his disciples as receptive as Bernhard Becker was at that time. The German laborer was not easy to reach. He was sunk too deep, as Lassalle exclaimed, in his "accursed wantlessness" (*verdammte Bedürfnisslosigkeit*) to perceive how low he was in the scale of being or to listen with any patience to such a revolution as Lassalle proposed. The prejudice indeed seemed to increase against Lassalle as he was better understood. There were great centres, as at Berlin, where he could not speak at all. At the end of three months of his canvass he had only a thousand followers, and never during his life more than five thousand. His failure soon became so glaring that Lassalle could not any longer deceive himself. In despair and disgust he continued the agitation for a while only at the entreaty of the Countess Hatzfeldt, who now at sixty had the keenest political interests.

Worn out at length with his fruitless task, Lassalle, in August of 1864, delegated all of his power as president of the General German Labor Organization to one Otto Dammer, and retired to the Rigi Kaltbad in Switzerland, where he was snatched away by death in a very unexpected manner.

To the Rigi Kaltbad came also Helene von Doennigsen, to whom Lassalle had been virtually betrothed since their acquaintance in Berlin. It was partly Lassalle's object at the Rigi to

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meet Helene's father, a Bavarian diplomatist, and to sue for her hand. The chief difficulty in their way, as all had anticipated and none more keenly than Helene, was that Herr von Doennigsen would refuse to give his consent. And this, Herr von Doennigsen, in spite of Lassalle's eloquence and his handsome face, did at once and in a manner that left the lovers little ground for hope. He would never permit the union of his daughter with a young Jewish demagogue who had been the bitter enemy of her caste. Helene was said to be very much like Lassalle in her personal appearance, and like him, too, in strength of will, and was far from being inclined to let Herr von Doennigsen's decision separate her from Lassalle. She knew her father too well, however, to hope, as Lassalle did, that he would ever relent. In despair she took refuge in Lassalle's room and implored him to elope with her as the only feasible solution of their trouble. But to her astonishment and shame Lassalle refused. An elopement could hardly recommend itself to him as the leader in a great ethical movement, and so he conducted Helene to her parents. They met the Frau von Doennigsen first in a neighboring house, and here Lassalle renewed his suit with great eloquence; but the noble lady, who was very naturally surprised at this sudden appearance of Lassalle with Helene, turned her back contemptuously on the "demagogue," and the three were in the midst of an unamiable scene when Herr von Doennigsen arrived. Apprised of his daughter's course, he came running in, breathless and bareheaded, with what weapon he could snatch on the way; and after resolutely defying Lassalle, dragged the half-fainting Helene across the street to their house. There, alone and deeply mortified, as she tells us, at Lassalle's cold treatment, she was constrained by her parents to accept a former lover, a Wallachian boyar, Janko von Racowitza. She wrote, or rather signed for Herr von Doennigsen, a letter in which she announced her decision to Lassalle. On receiving Helene's letter, Lassalle, who still thought that he would win, began to take the most extraordinary measures to rescue Helene from her parents. He first sent the Countess Hatzfeldt — who, though profoundly dis-

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trusted by Helene, seems to have really favored the union — on a mission to secure the intercession of the socialistically inclined Bishop Ketteler on the Rhine, who in his official capacity had accepted Lasselle's "cruel iron law" and had called on the wealthy of the world to aid laborers in forming co-operative associations. The good bishop expressed his great admiration for Lassalle, but regretted that he could do nothing to bring about the union of a Catholic with a Hegelian of the extreme left. If Lassalle were to become a Catholic, it would be different; and Lassalle had consented to become a Catholic when it was discovered that Herr von Doennigsen was a Protestant. In the meantime Lassalle had visited Munich to invoke the assistance of the Bavarian minister of foreign affairs, the Freiherr von Schrenk, who had a feeling heart and very willingly sent a lawyer from Munich to intercede with Herr von Doennigsen. But nothing was to save Lassalle. The minister's ambassador returned with the assurance from Helene's own lips that she would marry the boyar. Lassalle was now at his wits' end. He behaved like a madman. He is said, on hearing the report of Von Schrenk's envoy, to have run about the room screaming "revenge at any price." He had by telegram and letter kept his friends throughout Germany acquainted with each step in his contest with Herr von Doennigsen, and to be thus defeated was intolerable. He threw away Robespierre's stick, which he had carried up to this time, and with it his Social Democratic principles, and challenged both the boyar and Herr von Doennigsen to a duel with pistols. Herr von Doennigsen declined on the plea of age, and there was nothing left to the boyar, according to the ideas of his world, but to accept, and the arrangements were made for the duel. The boyar had been very delicate from his youth and had never been taught the use of a pistol. Helene naively confesses in her narrative that she, with all others, expected that Lassalle would kill "Janko," and had already arranged her portmanteau for a flight with Lassalle in this event. But the results were to be other than she expected. The boyar and Lassalle met on a Sunday morning, August 28, 1864, and at the first fire Lassalle was

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mortally wounded. He succeeded with the aid of his friends in walking to the carriage, and on arriving at the hotel, even up to his room, but the physicians from the first pronounced his case hopeless. They soothed his pain as best they could with opium until death brought this sad human comedy to an end. Lassalle died on the 31st of August, three days after he was wounded. He was then thirty-nine years old.

The boyar, notwithstanding his terrible part in this affair, seems to have been a person of great nobility of character, if one is to judge from Helene's account. He was then hopelessly ill with consumption, but was duly married to Helene, and she declares that he soothed her grief for Lassalle by watching at the poor man's bedside during his last days.

Lassalle had come again into conflict with the *misère* of his age, and this time it was he who was worsted. The news of his death filled the socialist world with astonishment and dismay. The Countess Hatzfeldt, who was herself deeply moved by Lassalle's fate, determined to arouse his followers by carrying the body in a triumphal procession through the chief cities of Germany. But the ghastly procession was not allowed to go any farther than Cologne. Here the police, at the request of Lassalle's family, took charge of the remains and had them sent to Breslau, where they were consigned to the old Jewish burying-ground, at length into the full peace and reconciliation of death.

That Lassalle died for socialism no one could say. He had forgotten his cause for Helene von Doennigsen just as he had deserted Heraclitus for the Countess Hatzfeldt. Lassalle was in no conceivable sense a martyr, but his tragic end served to give what he had taught that supreme emphasis which death gives to the work of the poorest life, and in far higher degree to work of such historical significance as Lassalle's. In this startling moment his social theory was brought before the German laborers as even Lassalle's golden tongue could never have presented it. The little leaven soon began to leaven the whole lump. From that day socialism has grown in Germany with an almost inconceivable rapidity. At his death Lassalle

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had only 4610 followers instead of the 100,000 on whom he had counted. But he now has nearly the latter number in Berlin alone. The German Socialists had twenty-four members in the last Reichstag, and in the late elections, although they have not increased the number of their seats, they have shown an appalling increase in the number of votes cast. Lassalle's radical idea of the state has become the most dangerous enemy of the present government, an enemy fully recognized by Bismarck in his present measures against the Socialists.

From the very temperament of the German people, a social theory which so gratified its speculative sense and at the same time offered so much hope to the suffering lower class must finally have had an immense hearing. From the days of the Anabaptists until now, the half-educated among the Germans and the entirely uneducated have always been ready to go on crusades for impossible ideas — from the founding of a Kingdom of God at Münster to a proletarian revolution from which the state is to emerge perfected and in a new form. The success of Henry George's theories with so practical and cautious a people as the Americans indicates what one may expect from such theories with a people among whom there still exists so much enthusiasm for the idea.

Socialism in the course of its development has departed largely from the teachings of Lassalle. The influence of Marx, who after the death of Lassalle was the chief spirit in the new organization, "widened" socialism and removed all of its local, patriotic traces. Socialism in itself is the product of the shadow side of our civilization, poverty, an apparition that has risen from its unfathomable, unending misery. Without Lassalle and without its present name it would have appeared as some mode of revolution and change. But to him is certainly due its freedom from the impossible French communism with which it was formerly associated, its historical basis and its definite goal. In these respects socialism is Lassalle's creation and must stand for his work in the world.

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ENGLAND AND THE COLONIES.

NATIONAL prejudice and partisanship are disturbing forces which must always be taken into account in passing judgment upon historical writings. Ranke says in one of his works that the English have too frequently written history in the spirit of criminal lawyers. Unfortunately that is true of the writers of all nationalities, the German not excepted.

No better example of this fault can be found, than the treatment which has usually been accorded the struggle between England and her thirteen American colonies. And it must be confessed that in general American writers have been much more at fault than their English opponents. The spirit of partisanship exhibited on this side the water has been more extreme. Sometimes, even within recent years, it has gone to such lengths as to approach the ridiculous. In many quarters the spirit of hero worship has so exalted the fathers of the country that all their utterances are received as oracles of political wisdom and any criticism of their views or conduct is regarded as something akin to blasphemy. This feeling is an outgrowth and illustration of the strength of public opinion so characteristic of democracies. Owing to its influence the fairest-minded American writers, in dealing with the constitutional relations of the colonies to the mother country, have not passed beyond the standpoint of Justice Story, *i.e.* they set the arguments used by either side over against each other, and then declare that the question was very difficult to determine. Nothing is easier than to acknowledge English supremacy over Canada or any of the other foreign possessions of the crown, and to act thereon; but by some strange twist of argument the effort is made to persuade us that in the seventeenth and eighteenth centuries the colonies between the Kennebec and Florida were in an entirely different position. Is it not time

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to abandon this superstition and treat the question, which was then propounded and solved, according to its merits? In that quarrel, as in all others, there were two parties, and if any one is disposed to assign blame it must be divided between the two. The English leaders were not fools or tyrants, but statesmen with clear conceptions of their rights if not of the means to be taken to secure them. The colonial leaders were not necessarily the mouthpieces of individual liberty or social progress, though they were the advocates of national independence. In this last idea, that of national independence, lies the secret spring of the revolt; that furnishes its sole and sufficient justification. Will those who insist that the cause of liberty was involved with American success, prove to us that the end has justified the means? It would be foolish to assert that the citizen of the United States to-day enjoys a greater degree of liberty than the subject of the crown, either in England or Canada. It would be hazardous to maintain that the progress of liberty in England itself was aided to any important degree by the revolt of the colonies. Lastly, in view of the fact that we have lapsed into a system of political corruption which in some of its aspects rivals the worst that the age of Walpole has to offer, it becomes us to be modest in our claims respecting social progress.

It is the object of this paper to deal with the constitutional relations existing between England and her colonies, and to show that the supremacy of king and Parliament over them was complete; that control was exercised in every department of governmental activity, judicial, legislative, ecclesiastical, military; that the right of the mother country to this control was uniformly asserted until the fortune of war compelled her to acknowledge America as an independent nation. On the other hand we shall find reasons for the growth of a different doctrine here, and that it was put forth very early in the history of the colonies. It will also appear that the whole struggle was but an episode in the development of the English colonial system and of the law which governs it.

The history of the development of this question falls natu-

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rally into two periods: first, from the beginning of English colonization in America to the Revolution of 1688; second, from 1688 to the Declaration of Independence. The history of Massachusetts affords the most suggestive facts and opinions in both periods, and so will be chiefly drawn upon in discussing the American side of the question.

Passing now to the history of the first period, it is to be observed that the leading institution in the English government at that time was the King in Council. When England was at the height of her colonial enterprise the monarchy was more nearly absolute than it had been since the reign of Henry II. During the later middle ages, by a series of royal grants, precedents had been established which looked toward a limitation of the royal power in matters of taxation and supply, general legislation, management of foreign affairs, and the administration of justice. The statutes embodying these limitations were not regarded by either side as a final settlement of the question in dispute. The kings frequently infringed them, and Parliament countenanced the infringements by silence. On the one side the institutions of local self-government were too firmly established to be overthrown, and were slowly evolving a representative system which was destined after many changes to permanently limit the royal power. Opposed to this was the conception of prerogative, which in the name of the general welfare was expanded to suit all needs. But in spite of contests between the baronage and corrupt or weak monarchs, like John, Henry III, Richard II, or of concessions won during a period of disputed succession, — the Lancastrian reigns, — prerogative still carried the day. Never were constitutional forms and limitations less regarded than under the Yorkist monarchs. The Tudors, after reconciling conflicting claims to the throne, ruled with ample prerogative over a weakened baronage and a submissive people. They also rounded out their power by the addition to it of full ecclesiastical supremacy. Outside of this, the realm of royal ordinance was undefined. In all judicial, financial and military affairs it was capable of indefinite expansion. Popular representation and ministerial responsibility had

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no existence. But in the seventeenth century, owing to a combination of very strong political and religious forces, the struggle between the King in Parliament and the King in Council was again opened and pushed with vigor. It continued with alternations of success, but on the whole with results favorable to Parliament, till 1688. Then the King in Parliament finally gained the ascendancy, and this result was so secured by statute as never afterwards to be seriously called in question.

The supremacy of Parliament was established by a series of royal concessions. The parliamentary party viewed these as compromises between Parliament and king. This gave color to the theory of social contract, which was now given new impulse and form by the parliamentarian writers of the sixteenth and seventeenth centuries. Opposed to it during the Tudor and Stuart period was the theory of *jure divino* kingship, or unlimited expansion of the prerogative. The constitutional results of the revolution of 1688 assumed the form of compact, and seemed thus to give that theory permanent validity for the English race. These facts are to be carefully noted, because they furnish us with the true standpoint from which to view the colonial question.

It naturally follows from what has been said that the administration of colonial affairs previous to 1688 was in the hands of the King in Council. Such was the fact. The enterprises of discovery were fitted out under the patronage of the crown; the territories discovered or visited were taken possession of in its name; and grants of land, of rights of government and trade, were made to actual settlers by the kings. Every colonial charter is a proof of this. As the king was by the theory of English law feudal proprietor of England, so he became proprietor of colonial territory, though that territory was granted out in socage, one of the freest forms of English tenure. Certain superficial distinctions were introduced in the form of colonial governments, as royal, proprietary, and charter; but they all emanated from the crown. Its supremacy extended around and beneath them all. The fact that they were established by

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grant is proof of this, even though there had been no subsequent acts to enforce the control. They were colonies of the English crown; their inhabitants were its subjects. The true doctrine of sovereignty and allegiance necessitates this conclusion.[1]

Coming now to the actual development of colonial administration, we find these views substantiated. Naturally the English of three centuries ago did not realize the full significance of their work across sea. Only a man here and there saw dimly that England was expanding into a great maritime empire. Knowledge of the geography of the new world increased very slowly. There was much indifference and ignorance both as to the true method and objects of colonization and as to the possibilities of wealth and power which might come to England through colonial expansion. This explains the carelessness shown in fixing the boundaries of colonial grants, and the liberal hand with which rights of government were bestowed in some of the early charters. Civil strife in the reign of Charles I, and the disorders of the Commonwealth furnish additional reasons for the neglect of colonial affairs at that time. In fact nothing like a systematic administration of the colonies was attempted till after the Restoration. By that time their commercial and military importance was coming to be realized. Lord Clarendon was the first English statesman to take a comprehensive view of the subject and to devise measures accordingly. He, however, like his predecessors, and those who followed him till after the great revolution, worked through the Privy Council, or a committee of the same, with the Board of Trade. Parliament passed few statutes affecting the colonies. Yet, not to mention others, there were five such of very great importance which fall within this period: the Act of Supremacy (1 Eliz. cap. 1), and the four Navigation acts. In all these the colonies were expressly mentioned. But the

[1] Calvin's Case, 7 Coke's Reports (6 Jac. I). Craw *vs.* Ramsey, Vaughn's Rep. (21 & 22 Car. II), Shower's Parl. Cases, pp. 30–34. Blanchard *vs.* Galdy, Salkeld 411 (5 Wm. & Mary). Christian *vs.* Cowen, 1 William's Reps., 329 (1749). Rex *vs.* Cowle, 2 Burrow's Reps., 834 (1759). Campbell *vs.* Hall, 20 State Trials (1774). Fabrigas *vs.* Mostyn, 1 Cowper's Reps., p. 170 (1774).

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relative position of crown and Parliament is illustrated by the fact that when in 1624 the Council was proceeding to annul the third Virginia charter, the House tried to interfere but was warned off — because the business concerned only the king and his advisers.

Moreover there was no lack of precedents for the extension not only of common law but of royal ordinances and statute law outside of the original realm of England. The French possessions had been governed by royal commission and Parliament had been known to tax them.[1] This was not inconsistent with the retention by those communities of their customary law. The same was true of the palatine jurisdictions, which had received the degree of independence they were allowed to enjoy through grants from William the Conqueror. Still better precedents were those of Wales and Ireland. Royal ordinances and decrees of the king's court had been enforced in these dependencies from the time of their conquest. All doubt of the right of England to extend her statute law over them was removed in the case of Wales by the acts 27, 34, and 37 Henry VIII; and in the case of Ireland by the Poynings acts, 10 Henry VII.[2]

Such in outline was the status of English colonial law previous to 1688. It was in the process of formation and adaptation to the new empire. There were ample precedents for the exercise of the rights of British sovereignty in America, but those rights had not yet been called into the fullest operation. Their legitimacy however was in general fully acknowledged by the colonists. They had been allowed great liberty in establishing their governments, erecting courts, levying taxes,

[1] Stubbs, Constitutional History, vol. iii, p. 265.

[2] For the law governing these dependencies, see especially Calvin's Case, 7 Coke's Institutes, Vaughn's Rep., pp. 289, 399. Also the other cases referred to above. Lord Mansfield in Rex *vs.* Cowle is very clear on this point. There was a dispute between the lawyers over the question whether the supremacy of the English courts extended itself over those dependencies, or whether special acts of Parliament were necessary. But this concerned only the detail of administration, not the fact of sovereignty. It was analogous to the question, so earnestly debated in this country about 1850, whether or not an act of Congress was needed to extend the supremacy of the constitution over newly acquired territory.

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organizing and calling out their militia for defence against the Indians. Colonial society had been allowed to develop freely in all lines and the product was far different from anything which existed in the mother country. It was democratic rather than aristocratic; it was also extremely particularistic, and too remote from England to feel much interest in the general concerns of the empire. In this divergence of social organization and interests, as between the colonies and the mother country, lay the germ which might develop into resistance on the part of the plantations, if at any time England should attempt to enforce her rightful supremacy over them. But as yet there was too little of the spirit of union among the colonists to make possible any combined action. Also those dynasties whose government had been most arbitrary in England, the Tudors and Stuarts, had, till the reign of James II, treated the colonies with great leniency.

But the statements just made do not cover the whole ground. They describe the attitude of the colonies in general toward the mother country, but they do not describe the special conditions which prevailed in New England. If we wish to know how the theory of colonial independence originated, we must look in that direction. The American revolution cannot be explained without reference to the political character and tendencies of Puritanism. New England comprised within itself all the literary activity worth mentioning, and all the systematic thought on government and religion, which existed in the colonies. Massachusetts in these respects led New England, and her spirit was intensely Puritan. So far as theories respecting politics and religion were a cause, the alienation and final separation of the colonies from the crown was produced by Puritanism. Here was played the last act of the great historic drama which absorbed the attention of England during the seventeenth century.

It has often been remarked that the settlers of Massachusetts came to this continent with a very distinct purpose in view. They belonged to a persecuted sect and party in England. They were opponents of the English church, and also parlia-

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mentarians as opposed to the absolutist policy of the monarchs. In this, as in all other events during that century, religious and political movements and ideas went hand in hand. Revolt against ecclesiastical authority necessarily extended over into the realm of politics. Puritanism then was a political as well a religious movement. On the one hand its doctrines contained a strong democratic leaven; on the other they contained principles which might lead to the separation of church and state. How the former tendency worked itself out in New England is familiar; how the latter failed of accomplishment there is equally well known. The Puritans of Massachusetts were not opposed to the union of church and state or to the employment of the secular power to enforce religious conformity. The ecclesiastical and temporal jurisdictions were never more closely blended than in that colony during the seventeenth century, and a peculiarly exasperating form of despotism was the result. What they were opposed to was every other form of state church except their own. They came to Massachusetts in order to realize there their own ideals of government and religion. They believed that they had reached ultimate truths on both subjects, and that human progress was vitally involved in the success of their experiment. They would tolerate no opposition or divergence of opinion.

In order to maintain her peculiar system, Massachusetts had to be on her guard against all interference from outside. Hence governmental control over opinions and acts was carried to an extreme. The papal inquisition never showed a keener scent for heresy or more vigor in punishing it than this Puritan oligarchy during the first two generations after the establishment of the colony. Roger Williams, the Antinomians, the Presbyterians, the Gortonites, the Anabaptists, the Quakers, together with divers persons whose course of life offended the moral sense of the community, experienced in rapid succession the quality of Puritan justice.

But it is not necessary here to enlarge upon Puritan intolerance and narrowness. Suffice it to say that the government of Massachusetts and that of England were at the time about

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equally intolerant. They differed in their belief only as to what opinions should be prohibited and what encouraged. We are concerned with the constitutional question which arose out of this.

The Massachusetts charter was brought over to this country. A few years later the Plymouth company was dissolved, and representation of the colony in England, except by such agents as she might send, ceased. The terms of the charter were very liberal; but like all the others it was a royal grant, and expressly stated that the inhabitants of the colony were to be subjects of England and were to enjoy all the liberties and immunities of such, as if they were in the realm of England. The oaths of supremacy and allegiance were to be administered to all who should go to the colony. The company was made a "body corporate and politic" and was given ample powers of government; but its laws, statutes, and ordinances were not to be contrary to the laws of England. The admission of freemen was left in the hands of the corporation.

How did the Puritan oligarchy make use of this charter for serving the purposes of their government? In a word, they interpreted the expression "body corporate and politic" to mean an independent state, and virtually abandoned all legal connection with England except an empty acknowledgment of allegiance. The oath of allegiance was not administered, but instead an oath of fidelity to the government of Massachusetts. An ecclesiastical system wholly different from that of England was established. Only those were admitted to political rights, made freemen, who were members of a Congregational church. All free inhabitants however were taxed for the support of the ministry and forced to attend the services of their established church. The free exercise of Anglican worship was denied. Thus, although the Act of Supremacy extended to the colonies, the English ecclesiastical system was wholly ignored. The colony also exercised full legislative and judicial powers, and denied the right of appeal both practically and theoretically. The proof of this is most direct and convincing. To illustrate: in 1646 the General Court refused to permit the appeal of Dr.

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Child[1] and others who, as Presbyterians, desired to lay before Parliament the wrongs they suffered in Massachusetts. Not only was the right denied, but the petitioners were prevented by force from carrying their case to England. The same course was pursued in reference to appeals in ordinary judicial cases. During the discussion of the affair just mentioned it was boldly affirmed in the General Court that subjects were bound by English laws only so long as they lived in England; that neither statutes nor royal ordinances were in force beyond the seas. A little later than this both the magistrates and the elders were called upon to give their views on the legal relations between the colony and England. Both agreed[2] that by their charter they "had absolute power of government"; that their government was perfect and sufficient in all its parts, not needing the help of any superior to make it complete. They acknowledged that they had received the charter from England, and "depended upon that state for protection and immunities as freeborn Englishmen"; but the duties which were correlative to those immunities, and which are necessary to a true conception of allegiance, were not mentioned. This position was consistently maintained by the Puritans of Massachusetts as long as they remained in power. In their correspondence with the home government and its officials between 1664 and 1684 the right of appeal was always denied. Its exercise was never allowed.[3] If we add to this the further statements that Massachusetts coined money; strove to enlarge the bounds of her patent, not only without consulting the king, but in defiance of his absolute prohibition; taxed English imports; and, without the consent of the home government, entered the New England confederation, some notion can be formed of the degree of independence claimed and exercised by that colony.

The exercise of this independence however did not make it legal. It only illustrates the fact that the roots of the American revolution extend back into the times of which we are speaking.

[1] Winthrop II, 319 *et seq.* [2] Winthrop II, 340–345.

[3] Respecting law of appeals, see cases cited above. Also Forsythe, Cases and Opinions on Constitutional Law, pp. 378 *et seq.*

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Its theory originated in the minds of the Puritan leaders who came over in the Arabella, and during the successive migrations by which Massachusetts and Connecticut were settled. It was reduced to practice there, assuming the form of substantial colonial independence, in order that a place of refuge for Puritanism might be secured. This thought runs through all the important public documents of Massachusetts. The chief object of dread at that time was not the financial, but the ecclesiastical supremacy of the crown. But the denial of the legality of royal control in one of its departments led logically and necessarily to its denial in all. And so we find the leaders of Massachusetts ready to resist, by force of arms if necessary, all interference with their so-called charter rights. Thus previous to 1640 the elements of colonial revolt were present, and it only required an interference on the part of the mother country to call them into activity.

It was to be expected that England would interfere to bring Massachusetts within the bounds of constitutional dependence. Complaint against the colony, on the part of Gorges and of those who had been banished by the Puritans, began very early. These lead to *quo warranto* proceedings for the recall of the charter in 1635. But civil strife at home compelled the government of Charles I to abandon the project. Then came the period of the Commonwealth, when the views of the English government were so fully in harmony with those of the New England leaders that the practical independence of the colony was ignored. Parliament in 1641 set aside the previous *quo warranto* and confirmed charter rights. In 1648 it agreed not to encourage appeals. But here, it will be noted, there was no renunciation of parliamentary rights.

We have seen that from the Restoration dates the beginning of a more comprehensive colonial policy. The strong Anglican views of Clarendon led naturally to an assertion of royal control over Massachusetts. The adoption of some plan to secure this end was both just and statesmanlike; the wrongs of the disfranchised and oppressed portions of the inhabitants had long been waiting for redress. The colonial leaders, Endicott,

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Leverett and others, saw the storm approaching and prepared to resist it. They made certain minor reforms, and drew up a statement of the privileges of the colony in which the right of appeal was virtually denied.[1] No move however was made toward administering the oath of allegiance to Charles II, or admitting Episcopalians to freedom of worship, or extending the franchise till it should be granted to the larger freeholders of the colony. Hence it was resolved to send the commission of 1664 to New England that it might obtain the aid of those colonies in the expulsion of the Dutch, heal disputes, and correct the abuses which had arisen in their governments. The selection of commissioners was in some respects unfortunate, but their instructions were mild and reasonable.[2] Real charter rights were in no respect to be infringed. Appeals were not to be heard, except in cases where the proceedings of colonial courts had been "expressly contrary to the rules prescribed by the charter." The commissioners were also to ascertain, among other things, whether the oath of allegiance had been generally taken, whether justice was administered in the king's name, and whether the Anglican form of worship was tolerated. They were also to see if treaties had been kept and the Navigation acts observed. Boundary disputes were to be referred to the Council for settlement.

These instructions, which in no respect exceeded the rightful powers of the home government, were observed by the commissioners. But the commission failed to accomplish its object in Massachusetts, because the General Court refused to acknowledge the right of appeal, or by the slightest act to countenance submission to the demands of England. A sham oath of allegiance was administered which virtually ignored royal jurisdiction. So the case was then understood to stand by both parties to the controvery.

Soon after, Clarendon was removed from office; and when the struggle between England and Massachusetts was resumed Danby was minister. By that time (1675) England had en-

[1] Colonial Records, iv, part ii, p. 25 *et seq.*
[2] Colonial Papers, April, 1664.

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tered on the policy of commercial restrictions. The merchants complained that the Navigation acts were evaded by Massachusetts. The Committee of Trade and Plantations resolved to send out Edward Randolph as the bearer of a letter to the colony charging it with failure to obey the Navigation acts, and with usurping the territorial rights of the Gorges and Mason heirs. With this began the last stage in the contest of which we are speaking. The prominence given to the question of commercial supremacy shows that we are approaching a new period in the development of English colonial policy. There were also indications of the growth of a new spirit in Massachusetts. But throughout the struggle of the next eight years the colonial authorities never departed from the constitutional doctrine they had before avowed. They asserted that there had been no serious violations of the laws of trade, and this was probably true. Amendment was promised, and an order was issued by the General Court that the acts should be obeyed throughout the colony.[1] This was followed a few months later by the remarkable statement that the colonists were not bound by said laws, because they were not represented in Parliament; that they could be enforced only after the Court had granted its sanction.[2] Royal customs officers were appointed, and met with no opposition in the discharge of their duties. Massachusetts also bought out the claims of the Gorges heirs, while those of Mason were set at rest for the time by an adverse decision of the law officers of the crown. The question was thus reduced to substantially the same form it had before, *viz.* whether or not the colony should be allowed still to assert a practical independence by refusing to administer the oath of allegiance, by enforcing laws repugnant to those of England, and by denying the right of appeal. The question of the right to coin money was also involved, but was not of primary importance.

In 1678 the General Court, moved by the threatening aspect

[1] Massachusetts Records, V, 155.

[2] *Ibid.*, V, 200. Among the expressions used was this: "The laws of England are bounded within the four seas, and do not reach America."

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of affairs in England, caused the oath of allegiance to be taken by all the people of the colony.[1] Promise was also made that the statute book should be purged of laws inconsistent with those of England. When however it came to an acknowledgment of the right of appeal, to the enlargement of the franchise, to the toleration of Episcopalians, — matters which involved the supremacy of the Puritan faith, — the fathers of Massachusetts were as obstinate as ever. On these points their agents were told to plead lack of instructions. These were the peculiar "liberties" of the colony, the sacrifice of which would be followed by the ruin of the political fabric which had been so carefully reared. They would not accept such laws as "would make them renounce the cause of their first coming."[2] This position they maintained to the end.

Meantime the law officers of the crown reported that cause existed which would justify the recall of the Massachusetts charter. In accordance with this, the Committee of Trade and Plantations recommended that proceedings be instituted. Delays followed, but the urgency of Randolph and the growth of absolute government in England slowly prepared the way for the crisis. New Hampshire was taken from the control of Massachusetts and organized as a royal province. Under the influence of repeated and threatening messages from the king, the General Court repealed a few unimportant statutes, and a second time sent agents to England. But up to the very last the agents were instructed to consent to no infringement of the liberties of the colony in matters of religion, or the admission of freemen, or appeals.[3] Although at the end some of the magistrates were ready to yield the disputed points and there was a growing party throughout the colony which favored submission, the deputies forced the maintenance of the original position. Under these circumstances the home government could do no less than resort to extreme measures. *Quo warranto* proceedings were instituted and a judgment in Chancery rendered vacating the Massachusetts charter, October 23, 1684.

[1] Colonial Records, V, 192. [2] Massachusetts Records, V, 201.
[3] Massachusetts Records, V, 347.

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The decree was issued and carried into execution the following year.[1] There were three charges in the decree of forfeiture: 1. That the government of the colony had levied a capitation tax on both freemen and non-freemen, and import duties on ships and merchandise entering the colony. 2. That money had been coined. 3. That the General Court had forbidden the taking of oaths, or the subscribing of articles and covenants which it had not approved. At the same time it had caused the oath of fidelity to be administered contrary to the express will of the king.[2]

Thus fell the first Massachusetts charter. With this event closes the first stage in the development of the idea of colonial independence. The struggle between the Puritans of Massachusetts and the crown is the most significant fact in American history previous to 1760. The Puritans were defeated; the authority of England was reasserted. The government of the province lapsed entirely into the hands of the crown, and thus the way was opened for the union of the Northern colonies under one administrative system, which was soon carried out by the commissions to Governor Andros. Religious liberty was now recognized, land titles were overhauled, taxes were levied by the officers of the crown. The defeat of the Puritans was due not simply to an exertion of royal prerogative, but to defection within their own ranks. Their religious and political system was too unnatural to last. Its overthrow was necessary to the social progress of the community. Human nature was bound to assert itself sooner or later. Therefore as we approach the close of the seventeenth century, we find the works of the Puritan leaders full of mournful reflections on the degeneracy of the times.[3] This means that society was bursting the bonds within which the elders and the magistrates had sought to confine

[1] Massachusetts Historical Collection, Fourth Series, vol. ii.

[2] The words of the oath were: "You, A. B., do acknowledge yourself subject to the laws of this jurisdiction during your residence under this government, and do here swear by the great name of the ever-living God and engage yourself to be true and faithful to the same, and not to plot, contrive or conceal anything that is to the detriment thereof."

[3] Mather, Magnalia, II, 316 *et seq.*

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it for all time. But for our purpose the important result is that the Puritans left behind them an armory full of precedents and arguments in favor of colonial independence. They had constructed the American theory on that subject. That was the chief permanent result of their experiment. They had from first to last adhered to the theory which expediency taught them to adopt. They taught the colonists how to resist the exercise of the ecclesiastical and judicial supremacy of the crown. If now at any time in the future the Americans should consider themselves aggrieved by the acts of the English government, the Puritan spirit and theory would be likely to appear. Such was the aspect of affairs at the close of the first period of colonial history.

After the revolution of 1688, Parliament assumes more and more the control of American concerns. Statutes on those subjects multiply. The administration of the colonies becomes a branch of the ministerial government of Great Britain. The development of an imperial as distinguished from an insular policy is begun. The interferences of England in colonial affairs became more frequent and the control asserted more extensive than heretofore. There were two important reasons for this. The first is to be found in the dynastic struggles of the eighteenth century. By these the foreign possessions of the countries engaged were imperilled, and a system of imperial defence made necessary. The second cause was the increasing strength of the commercial classes of England in Parliament and their desire to monopolize colonial trade. There were signs of the growth of this spirit before the revolution, and it increased in strength as the maritime supremacy of England became more fully established. It is not necessary here to enter upon the details of English commercial policy toward America. It must be judged according to the economic ideas of the time. The theory upon which it was based, at least in the exaggerated form assumed by it at the time, will find no defenders to-day, unless it be among extreme American protectionists. Under its influence the colonies found Parliament to be a more exacting master than the kings had ever been. Statutes were passed

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which interfered in the most minute and arbitrary way with internal and foreign traffic.[1] William III thought he was not transgressing his constitutional right when he instructed the Board of Trade to inquire into all the means of making the colonies most useful and beneficial to England. The act of 1696 consolidating the laws of trade provided that a special oath to enforce the laws should be required from colonial governors; that the appointment of the governors should be subject to royal approval; that the revenue collectors in the colonies should have all the powers possessed by such officers in England; that all colonial statutes in conflict with the acts of trade should be void. Admiralty courts were established throughout America. The laws in reference to the manufacture and transportation of wool, of iron and of hats only need be mentioned. By the statute of 1710 Parliament established an American post office. In 1708 it provided for a system of coinage, and forbade further issues of paper money. These and many other statutes prove that Parliament sufficiently asserted its control over trade during the period in question. The ministers were prevented from going further only by the fear that the interests of the English merchants would thereby suffer. During the wars military supremacy was of course exercised. Judicial and legislative supremacy was also maintained by appeals, and the submitting of colonial statutes to the king for his approval or rejection. Charters were very generally regulated and popular rights curtailed. To say however that these measures were taken by Parliament is far from saying that they were generally obeyed. They were very imperfectly enforced, owing to the distance from England, the large extent of country, and the scattered population. These were obstacles in the way of administration which the devices of that age could not overcome, but they do not affect the constitutionality of the measures adopted by England.

[1] Of the sixty or more statutes passed for the government of the colonies between 1688 and 1765 nearly fifty were for the regulation of trade. The others were upon a variety of subjects, as naturalization, piracy, the army, paper money and coinage, punishment of governors, collection of debts, *etc.*

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The attitude of the colonists during this period was one of passive rather than active resistance. Parliamentary restrictions were so far evaded as not to be burdensome. In America, as in England, it was a time of material prosperity and political repose. Only an occasional protest against English laws was offered. Disputes with governors about their salaries occupied much of the attention of colonial assemblies. Also, so long as the French remained in possession of Canada and the Mississippi valley, the colonists saw clearly their need of English protection. Finally, the idea of united action among the colonies had dawned upon only a few leading minds.

No conditions are so favorable to the growth of individualism as frontier life. Each individual or family is there brought face to face with savage men, and forced to depend on its own resources. Contact with civilized life ceases, and union between settlers or communities becomes almost impossible. Society is atomized. Views of life and policy become narrow and provincial. Self-interest and local attachment become abnormally developed. These conditions prevailed in all the colonies, but in an extreme form along the western border, from New York to Georgia. There the loosest notions concerning individual liberty and local independence prevailed. The circle of the frontiersman's interests was bounded by his family or immediate neighborhood. If it was broad enough to embrace the colony, he, like Patrick Henry, declared the colony to be his "country." Such men were not in a position to take broad views of public policy. They were too much isolated. The spirit of co-operation on a large scale had not begun to develop.

The records show that the burden of opinion in the colonies was jealousy of all government, so far as it operated as a restraint. The interference of government, whether colonial or imperial, was welcomed by the colonists, when it could be used for the advancement of their private or local interests; when larger objects were aimed at, it was if possible ignored or resisted. As the colonist's conception of his liberty was exaggerated, so was his sensitiveness of encroachment on the part of the higher powers, whether they were governor, Council, or Par-

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liament. The idea of taxation filled the larger part of his political horizon. Disputes concerning this subject fill a correspondingly large part of the colonial records of the eighteenth century. The average provincial seems to have regarded the state largely as a taxing machine, which took away his money without rendering him an equivalent. Every form of tax was therefore to be viewed with jealousy and avoided if possible. This idea it is most important to bear in mind, because of its influence on the current American notions of the English constitution and the use which was to be made of them in the approaching struggle with the mother country.

The political condition of the colonies was for the first time clearly revealed during the French and Indian war. The history of Germany can furnish no more vivid spectacle of the evils of particularism than does that struggle. The Quaker assembly of Pennsylvania allowed the French and Indians to ravage their frontier for two years without taking any effective measures of relief, because they were obstinately bent on maintaining the doctrine that royal and proprietary instructions were unconstitutional. The indifference in Virginia was not so great, but it was such as to draw from Governor Dinwiddie the very just observation: "I fully agree that no expedition can be conducted here with a dependence on these assemblies."[1] Governor Shirley well described the attitude of the colonies in general toward the war by saying: "They are very much governed by assemblies independent of each other, frequently disunited in their councils, some of them very remote from others, all of them looking upon themselves to be concerned in the common cause in proportion to their nearness to, or remoteness from the present danger."[2] The letters of Washington, written from the camp during the years 1754 to 1758, are filled to overflowing with complaints of the apathy and lack of patriotism exhibited by the assemblies, their failure to provide for the organization, disciplining, and provisioning of the troops, and of the intense suffering caused thereby.[3] In 1756 the

[1] Pennsylvania Colonial Records, VI, 164. [2] *Ibid.*, p. 18.
[3] Writings, Sparks' edition, vol. ii.

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Virginia House of Burgesses ordered that its troops should not be marched out of the province. Trade with the hostile French and Indians was continued by English settlers and no effective means were taken to stop it. There is abundant evidence that the quality of the soldiery was not the best; but men cannot be severely blamed for deserting or becoming insubordinate when they were left without anything like adequate food, clothing, or shelter. Washington in 1756 was ready to "lament the hour that gave him the command,"[1] and had the danger of the colony been less imminent than it was, would have at once resigned. The condition of anarchy and helplessness revealed by the war was such as to convince all the servants of the crown in America that active parliamentary interference was necessary,[2] if the colonies were to be defended and retained as an integral part of the British empire. The fact that the British government, within a reasonable time after the close of the war, proceeded to put this suggestion into execution, implies nothing arbitrary or unreasonable. It had the undoubted constitutional right to do so; and so far as could be seen at the time, expediency prompted in the same direction.

But during the century since the Puritan oligarchy of Massachusetts yielded to the supremacy of the crown, the theory of social contract had been fully developed. It had formulated the needs of the opposition in all the European countries to the system of absolutism. It was the theory of government very generally held by the Puritans in both England and America. Milton used it in opposition to Hobbes and the other defenders of prerogative, in the time of the Commonwealth. Locke, the philosopher of the revolution, was its classical expounder. He was the Rousseau of Anglo-Saxon peoples.

This theory, as soon as it was understood, would naturally find general acceptance in the colonies. It was consistent with the facts of democracy, and with the objects aimed at by that movement in the eighteenth century. According to it the state originated in the free contract of individuals; *i.e.*, it confounded society and the state. This was not unlike the condition of

[1] Writings, II, 143. [2] Bancroft, III, 116.

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things in the colonies. There society was all-important, all-powerful, and the state was correspondingly weak. Individual interest, not organic unity, was the predominant fact. There was little common history or inherited culture to bind men together. At times the bonds which united them seemed ready to break, and society about to be resolved into its original elements. Moreover this theory could, in case of need, be very conveniently applied to the relations between the colonies and the mother country. Numerous indications may be found in the history of the Puritan contest of the previous century that it might and would be so used. Grants issued by the crown might be made to appear as contracts between the people and the king. This, as we have seen, had been done in England. It was to become the theory according to which the colonists would insist that their relations to the mother country should be regulated. The American revolution, as truly as the French, was the outgrowth of the doctrine of natural rights and social contract. By this I mean simply that the doctrine in question formed the theoretical basis of both movements. So far as the American revolution is concerned the proof of this statement is contained in the writings of the patriot leaders at the time, the various state papers that were issued, and the doctrine that was held respecting the right of imperial taxation.

No man contributed so much to bringing about the revolution as Samuel Adams; and his mind was saturated with the theory of social contract. He made it the basis of all his reasonings. It may be found elaborated in his early essays.[1] The "natural rights and privileges of the British subject" were ever before his mind. In a reply to Governor Bernard, written on behalf of a committee of the Massachusetts legislature in 1765, he says: "They (the colonists) have a just value for those inestimable rights which are derived to all men from nature, and are happily interwoven in the British constitution."[2] His *Report on the Rights of the Colonies*, presented to the town

[1] Wells, Life of Adams, II, 19 *et seq.*
[2] *Ibid.*, I, 72 *et seq.*

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meeting in Boston in 1772,[1] reads as if it might have come from the pen of Rousseau. It is expressly based on the doctrines of Locke. The following are specimen sentences:

> When men enter into society, it is by voluntary consent; and they have a right to demand and insist upon the performance of such conditions and previous limitations, as form an equitable original compact. Every natural right, not expressly given up, or, from the nature of a social compact, necessarily ceded, remains.

It was not difficult for a man with those views to reach the doctrine of absolute colonial independence.[2]

James Otis stood on substantially the same ground, though he was not so thoroughgoing and consistent in his advocacy of the theory as was Adams. His argument to prove the unconstitutionality of parliamentary taxation without representation was that in the state of nature no one could be deprived of his property without his consent.[3] Were it otherwise, men would be slaves. Such a proceeding therefore is a breach of the law of nature, and no law of society can make it just. The Stamp act would be void, even if all the charters had been recalled and the colonies brought under the immediate control of the crown. Dickinson of Pennsylvania advocated, in its extreme form, the doctrine that the power of taxation is limited by the consent of the governed.[4] Jefferson's belief in the natural rights of the colonists is too well known to need more than a passing notice. Thomas Paine's *Common Sense*, published in 1776, was in perfect harmony with contemporary political thought in France. Even Alexander Hamilton was carried away with youthful enthusiasm for the popular doctrine.[5] In the pamphlets which he issued in 1775, especially the *Farmer Refuted*, he plants himself firmly upon the theory of natural rights. "It is," said he, "the unalienable birthright of every Englishman who can be considered as a free agent, to participate in framing

[1] Wells, I, 502 *et seq.*

[2] See also Adams' Reply to Hutchinson (1773), Wells, II, 42 *et seq.* In this he first avowed the doctrine of colonial independence.

[3] Rights of the British Colonies (London, 1766), p. 57.

[4] Letters of a Farmer (London, 1768).

[5] Works, Lodge's Edition, I, 53 *et seq.*

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the laws which are to bind him, either as to his life or property." He believed that the relation between the king and the colonies was one of compact, and therefore that Parliament had no control whatever. The king agreed to furnish protection, and the colonists to yield obedience. He derived all government from compact, and believed it "liable to such limitations as are necessary for the security of the absolute rights of the governed." These pamphlets are said to have had considerable influence in shaping opinion in New York. But John Adams is the best witness on this point. There is a characteristic frankness about him which is quite satisfactory. He wrote also just before the resort to arms, when theories were taking their final shape. Speaking of the development of the English empire, he said:

> It [the idea of empire] cannot be supplied consistently with reason, justice, policy, morality, or humanity, without the consent of the colonies. . . . If the English Parliament were to govern us, where did they get the right, without our consent, to take the Scottish Parliament into a participation of the government over us? When this was done, was the American share of the democracy of the constitution consulted?[1]

In replying to the statement that the colonies became on their settlement part of the English possessions, he asked: "Has there been any such contract between Britain and the colonies?"[2] But the doctrine appears most clearly in the following passages:

> We have by our express consent contracted to observe the Navigation act, and by our implied consent, by long usage and uninterrupted acquiescence, have submitted to the other acts of trade, however grievous some of them may be. This may be compared to a treaty of commerce, by which these distinct states are cemented together in perpetual league and amity. . . . How then do we, New England men, derive our laws? I say, not from Parliament, not from common law, but from the law of nature, and the compact made with the king in our charters. Our ancestors were entitled to the common law of England when they emigrated, that is, to just so much of it as they pleased to adopt, and no more. They were not bound or obliged to submit to it, unless they chose it.[3]

The above arguments were fortified by reference to the declarations of the Puritan leaders in 1676. The importance of the

[1] Novanglus, Works, IV, 38. [2] Novanglus, p. 102. [3] *Ibid.*, pp. 113, 122.

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views expressed will be appreciated, when it is remembered that Adams took a leading part in bringing about the Declaration of Independence, in the formation of revolutionary governments in the states, and in securing recognition for the new government abroad.[1]

It thus appears that the most prominent revolutionary leaders were, from an early period in the contest, either pronounced supporters of the doctrine of social contract or strongly influenced by the same. The doctrine flourished on Massachusetts soil better than elsewhere, because the spirit of independence was more deeply rooted and more consciously cherished there than elsewhere. There is no proof that the Massachusetts legislature ever abandoned the doctrine contained in her resolves on the Stamp act, passed in 1765, *viz.*, "that there are certain essential rights of the British constitution of government, which are founded in the law of God and nature, and are the common right of mankind." The path between this and the "unalienable rights" of the Declaration of Independence is direct. The declaration of rights[2] issued by the Virginia legisture illustrates the progress of ideas during the interval.

Closely connected with and growing out of this idea was the theory of representation and taxation, as held by the Americans. It assumed two forms. According to one there was no distinction between an external and an internal tax; both, as applied to the colonies, were unconstitutional, because they took money without the subject's consent. The theory in this form was held by Dickinson. He also argued that all import duties collected in the colonies, so long as the laws of trade were maintained, were in effect taxes, and hence unconstitutional.[3] But according to the views of most of the colonists, especially in the earlier stages of the struggle, a radical distinction existed between parliamentary control over internal and that over external taxation. According to this view export and import duties

[1] Adams also had a large share in the formation of the first Massachusetts constitution, 1780, and his views concerning natural rights were fully incorporated in that instrument.

[2] Bancroft, V, 260.

[3] See Letters of a Farmer; Second Letter.

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levied for the regulation of trade were not taxes, and were within the sphere of parliamentary control because they affected the interests of the whole empire. Internal taxes, or taxes proper, could be levied only with the consent of the subjects through their representatives. This theory, in whatever form expressed, is untenable. It is based upon the idea that the right of private property is original, natural, and absolute. "Property," said Chatham, who held the theory in its second form, "is private, individual, absolute. There is no such thing, no such idea in this constitution, as a supreme power operating upon property."[1] This theory was given a semblance of truth by the fact that all money bills originated in the House of Commons. But in that body at the time the mass of the people was not represented. There was no democratic element in the constitution. Lord Mansfield said: "The notion that every subject must be represented by a deputy, if he does not vote in Parliament, is merely ideal."[2] Parliament took the property of the great majority of the English people without their consent, and had always done so. Political science recognizes no distinction in kind between taxation and the exercise of legislative power in other departments, or between so-called internal and external taxes. An argument which would disprove the constitutionality of the one, overthrows the other also. The fact that Parliament had legislated for the colonies at all proves her right to tax them. The theory of English parliamentary control over the colonies was as fully established and as firmly supported by precedents as any system could be. Lord Mansfield stated it correctly when he said:

> The British legislature, as to power of making laws, represents the whole British empire, and has authority to bind every part and every subject without the least distinction, whether such subjects have the right to vote or not, or whether the law binds places within the realm, or without.

All the decisions of the English courts sustain this view. Both of the English parties were substantially agreed respecting it.

[1] Speech in support of the motion to recall the troops from Boston, January, 1775.
[2] Parliamentary History, XVI, 172.

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The king, to be sure, was arbitrary, and Parliament was corrupt; but that does not affect the truth of the doctrine they upheld. It was supported by the best political thinkers of the time. The adoption of any other view would have been revolutionary.

On the other hand, the theory of Chatham and the colonists was based upon an ideal conception of the British constitution which is not yet realized, and upon a radically erroneous view of the right of private property. This was the theory of natural rights applied to property, and of social contract applied to taxation. Extend the doctrines which they advocated respecting finance to the other lines of governmental control, and you have the theory of social contract substantially as stated by Locke. It was characteristic of the English people that that part of the theory which bore on the right of property should be made very prominent. Locke made the great end of government to be the preservation of property. He considered the right of property next in importance to that of freedom. His *dictum* concerning the power of taxation was: "The legislature cannot take any part of a man's property without his consent, else there could be no property right." The colonists took up Locke's theory and tried between 1765 and 1776 to force the English constitution into conformity with it. Failing in that, they declared their independence and secured it by force of arms. The principle of popular sovereignty, which they had not been able to realize while united to England, they now brought into practical operation. But for a long time the theory of contract threatened to shipwreck the new system. Its final application was to the relations borne by the states to the people. However, the logic of events proved too strong for it. It was forced to give way before the establishment of a new nation with a sovereign power at its head.

We have traced the tendency to local and national independence, which began with the Puritans and was sustained by the conditions of colonial life, through to its culmination. The reason why New England became the leader of the movement clearly appears. The process of development through which the colonies passed was a natural, and therefore a necessary

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one. It was slow and obscure, and therefore could not be clearly recognized at the time. But that it was nevertheless revolutionary becomes evident when we compare the views and aims of the colonists with the constitution of the British empire. When the two systems came into collision the colonists adopted a theory which was "in the air" at the time, but one under which no government can be successfully carried on. When they came to erect a government of their own, they had to abandon it. It is not claimed that the doctrine of natural rights ever found such general acceptance in America as in France. The character of the people and the absence of a despotic government prevented that. But that the American revolution cannot be explained without assigning it a prominent place is evident.

It is not intended to convey the impression that the colonists had no grievances. There were causes for complaint, but they were doubtless greatly exaggerated. A mind filled with the democratic theories of the times, and with the loose notions concerning sovereignty and allegiance which then prevailed, could easily imagine that Parliament, unless resisted, would establish a despotic government in America. This feeling was kept alive by popular agitators till it became widespread; but a very respectable minority never sympathized with it. The idea that Parliament was totally corrupt and that the entire system of Anglican liberty would be overthrown if America did not come to the rescue, was industriously promoted. But it would be difficult to show the connection between the revolt of the colonies and the purification of English politics. England has shown that she possessed within herself forces sufficient for her regeneration. The era of reform did not begin till nearly fifty years after the close of the American revolution. Parliament was then forced to abolish rotten boroughs and extend the franchise, not by the growth of a republic in America, but by industrial development and the consequent growth of large cities within her own borders. It is noteworthy also that this process began in England at about the time when the "spoils system" was introduced into American politics. We must conclude then

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that the fears entertained by the revolutionary leaders respecting the future of English liberty have not been justified by history.

The distance between England and America furnished the colonists with their chief cause of complaint; but now it is easy to see that it was also their great protection. An oppressive system of government could not then have been maintained at such a distance, among such a people, and over so large a territory. Natural obstacles alone would have prevented it. Moreover the Americans were too sensitive as to what they considered their rights, especially in whatever concerned the pocket, to tolerate much encroachment.

But there is no proof that Parliament intended to overthrow the constitutional rights of the colonists. It has not been attempted in the case of any other colony or group of colonies. There was nothing that can be called tyrannical or unconstitutional in the plans of Grenville, Townshend, or Lord North. Severe measures were not resorted to till they were provoked by colonial resistance. The most that we can say of the policy is that it was blundering and vacillating. No one can deny that there was need of the introduction of order into the administration of the colonies. There was nothing unfair in the proposal that they should pay the expenses of their government. The anarchy which had prevailed accounts to a large extent for other and more extreme measures held in reserve by Charles Townshend. Strangely enough the worst grievance of all, *viz.* the laws of trade, was scarcely mentioned in the controversy.

One thought more is necessary for the completion of the argument. England was forced to give up her thirteen American colonies because the time had come for the formation of a new nation. But she did not change her theory of colonial government. The system of colonial law by which the members of the British empire were held together long remained as it had been in 1776. The foundation upon which it rested, *viz.* the supremacy of the King in Parliament in all lines of administration, remains unimpaired till the present time. No English statesman would accept for a moment the theories

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advocated by the Americans before the revolution. The doctrines laid down by Lord Mansfield and his predecessors on the bench have always been regarded as authoritative and final.[1] Sir Vernon Harcourt asserted in 1879:

> As a matter of abstract right, the mother country has never parted with the claim of ultimate, supreme authority for the imperial legislature. If it did so, it would dissolve the imperial tie, and convert the colonies into foreign and independent states.[2]

During the forties, owing to disturbances in Canada and the adjacent provinces, Earl Grey began the establishment of responsible parliamentary governments in the colonies. That process continued until, by 1880, the system became practically universal. Extensive powers of local government are now in the hands of the colonial governors, ministers, and assemblies, but they have been granted by the Imperial Parliament. Parliament has by statute limited its own prerogative. Important powers have in all cases been reserved. In this there is nothing inconsistent with parliamentary supremacy. In 1865 the legislative supremacy of Parliament was reasserted in the following terms:

> Any colonial law which is or shall be in any respect repugnant to the provisions of any act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such act of Parliament, or having in the colony the force and effect of such act, shall be read subject to such act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.[3]

Chief Justice Cockburn decided that, if Parliament exceed its legislatorial capacity, the courts must obey Parliament, however contrary to the international comity such legislation may be.[4] The colonial governors are appointed by the crown and directly represent imperial interests. Between 1836 and 1864 the governors of the North American colonies reserved 341

[1] Lord Brougham in Mayor of Lynn *vs.* E. India Co., 1 Moore, P. P. C.
[2] Quoted by Todd, Parliamentary Government in the British Colonies, p. 27.
[3] 28 and 29 Vict. c. 63, secs. 1, 2.
[4] Rex *vs.* Keyes, Law Rep. 2 Ex. Div. 152–160.

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bills for reference to the crown. To 47 of these the assent of the crown was refused.[1] The right of appeal, on political questions to the Cabinet and on legal questions to the judicial committee of the Council, is fully recognized. The right of internal taxation has been resigned. The colonies regulate their own commerce, provided they do not infringe treaties. Parliament cares for the general interests of the trade of the empire. Naturalization is also under its control. Parliament finally has charge of foreign affairs, as the making of treaties, war and peace, the imperial army and navy. All this is true even in respect to those dependencies which, like Canada, have been given the largest degree of local independence. All the inhabitants of the colonies are subjects of England, under the protection of the crown and Parliament, and owing to them in return the duties implied in allegiance.

The forms of colonial government have been changed to meet the needs of the times, but the source of power remains the same. The legal relations which before 1688 were in the process of establishment have now found complete statutory expression. The law of the English empire is universally recognized. The position taken by the home government in the contest with America has been substantially confirmed. This fact ought forever to settle that question, so far as the matter of constitutional right is concerned. The theory as well as the action of the colonists was revolutionary.

HERBERT L. OSGOOD.

[1] Todd, p. 140, note.

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THE CAUSE OF SECESSION.

WE have been trying ever since the close of the Civil war to obliterate the old sectional lines. Our success, although considerable, is far from perfect; the lines are still traceable; the terms North and South retain too much of their earlier meaning. This vitality of the sectional spirit, so long after the main cause which produced it has disappeared, testifies to the completeness of the sectionalization and to the conservatism of American character; but these facts do not constitute a sufficient explanation. The public spirit and the practical instincts of the American people favor the fullest and speediest reconciliation. Why is it so slow in coming? I believe that an important but generally overlooked reason is the erroneous character of prevalent theories respecting the origin and nature of the secession movement. In the North those who seceded are assigned an unjust degree of responsibility for secession and its consequences. In the South, on the contrary, the defenders of the Union are regarded as aggressors, and therefore as responsible for all that was suffered by the South.

What exactly is the Northern theory? Previous to the passage of the ordinance by which South Carolina undertook to make herself independent of the United States, the North had never really believed that a serious attempt to destroy the Union would be made. Threats of disunion had been heard often, and at times these had borne the marks of settled purpose, as for example in 1849. But hitherto they had yielded to concessions; and the North had come to believe that in any possible emergency the Union could as a last resort be saved as it had been before, by compromise. That slavery was a disturbing influence was clearly recognized; that the Union could not go on indefinitely upon the old basis which united a free- with a slave-labor section was also seen. But the basis was to be

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changed and the Union saved. This was the position generally taken by the leaders of the Republican party. Its best expression is found in the frequently quoted opening paragraph of Mr. Lincoln's speech before the Republican state convention of Illinois:

> We are now far into the fifth year, since a policy was initiated with this avowed object and confident promise of putting an end to slavery agitation. Under the operation of that policy, that agitation has not only not ceased, but has constantly augmented. In my opinion it will not close until a crisis shall have been reached and passed. "A house divided against itself can not stand." I believe this government can not endure permanently, half slave and half free. I do not expect the Union to be dissolved — I do not expect the house to fall — but I do expect it will cease to be divided. It will become all one thing or all the other. Either the opponents of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its advocates will push it forward till it shall become alike lawful in all the states, old as well as new, North as well as South.[1]

That slavery, through restriction and the operation of moral and economic influences, would gradually disappear was the belief of the party which was already dominant in the North and was soon to become responsible for the restoration of a divided Union. That the South would resort to revolutionary means for the preservation of slavery was not seriously apprehended. This, as we know, was a mistake. Before the close of 1860 the North and the Republican party were confronted by the fact of secession. At first, relying upon earlier tactics, the attempt was made to win back the seceded states by concessions. These extended to the surrender of the right to interfere with slavery in the states by future amendment to the constitution. It was in vain; the South, having resolved on disunion, insisted on conditions which the North could not make without suffering a moral injury infinitely worse than the worst possible results of secession and civil war. Up to the time when the efforts for peace were seen to be hopeless, slavery was generally recognized as the source of the trouble. The attack upon Sumter

[1] Lincoln-Douglass Debates, p. 1.

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turned the public attention in another direction. The North which could not be united against slavery could be united against disunion. In order to secure Northern unity in the fullest degree, the relation of slavery to secession was, for the time being, purposely ignored. On July 22, 1861, Mr. Crittenden offered, and the House by an overwhelming majority adopted, a resolution of which the following is the significant portion:

> That this war is not waged upon our part in any spirit of oppression, nor for any purpose of conquest or subjugation, nor purpose of overthrowing or interfering with the rights of those states; but to defend and maintain the supremacy of the constitution, and to preserve the Union with all the dignity, equality, and rights of the several states unimpaired; that as soon as these objects are accomplished the war ought to cease.[1]

In substance the resolution affirms that the war is waged for the purpose of restoring the Union exactly as it was before secession took place — in other words, that the rights of the states and the interests of slavery shall not suffer through the war. Soon, however, it became evident that the most effective way to save the Union was through destroying slavery. In the following December the House refused to commit itself again to the principles of the Crittenden resolution. In the two following years the emancipation proclamations were issued. In 1864 the Republican national convention, in the third resolution of its platform, declared:

> That as slavery was the cause, and now constitutes the strength of this rebellion, and as it must be, always and everywhere, hostile to the principles of republican government, justice and the national safety demand its utter and complete extirpation from the soil of the republic; and that while we uphold and maintain the acts and proclamations by which the government, in its own defence, has aimed a death blow at this gigantic evil, we are in favor, furthermore, of such amendment to the constitution, to be made by the people in conformity with its provisions, as shall terminate and forever prohibit the existence of slavery within the limits or jurisdiction of the United States.[2]

[1] McPherson, History of the Rebellion, p. 286.
[2] Stanwood, Presidential Elections, p. 240.

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In affirming that "slavery was the cause" of the rebellion, that it is "hostile to the principles of republican government" and that "the national safety" demands its extirpation, the resolution states in terse, vigorous terms a definite theory of the origin and nature of the secession movement. The theory was not new; but at this convention it received for the first time the formal sanction of the Republican party, and, in the ensuing election, that of all the free states save one. In accord with it, the war was prosecuted to its successful close and the thirteenth, fourteenth and fifteenth amendments were added to the constitution. Closely examined, the resolution vindicated the abolitionists, — not indeed necessarily their methods, but, in the most emphatic way, their prescience and motives. Moreover, by making slavery the scapegoat for the sins of the people, it opened the way for reconciliation. It was a noble utterance; through it the convention, while remaining in the best sense true to party and country, rose above both and became the representative of civilization itself.

Another theory which both at the opening of the Civil war and since its close has crowded into the background the one embodied in the above resolution, is given by Mr. Blaine in his work entitled *Twenty Years of Congress*. After showing that the advocates of secession had failed to make a satisfactory exhibit of grievances, although the fitting opportunities for doing so were numerous and the propriety obvious, Mr. Blaine criticizes the effort of Jefferson Davis to supply the defect by recounting in a message to the Confederate Congress the measures of the Federal government which he deemed hostile to the South. In this criticism, Mr. Blaine, after affirming that "not a single measure adverse to the interests of slavery had been passed by the Congress of the United States from the foundation of the government," gives an impressive enumeration of measures which tended to strengthen slavery, and thus proceeds:

> Against all these guaranties and concessions for the support of slavery, Mr. Davis could quote, not anti-slavery aggressions which had been made, but only those which might be made in the future. This position

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disclosed the real though not the avowed cause of the secession movement. Its authors were not afraid of an immediate invasion of the rights of the slave-holder in the states, but they were conscious that the growth of the country, the progress of civilization, and the expansion of our population, were all hostile to their continued supremacy as the governing element in the republic. The South was the only section in which there was distinctively a governing class. The slave-holders ruled their states more positively than ever the aristocratic classes ruled England. Besides the distinction of free and slave, or black and white, there was another line of demarcation between white men that was as absolute as the division between patrician and plebeian. The nobles of Poland who dictated the policy of the kingdom were as numerous in proportion to the whole population as the rich class of slave-holders whose decrees governed the policy of their states. It was in short an oligarchy which by its combined power ruled the republic. No President of any party had ever been elected who was opposed to its supremacy. The political revolution of 1860 had given to the republic an anti-slavery President, and the Southern men refused to accept the result. They had been too long accustomed to power to surrender it to an adverse majority, however lawful or constitutional that majority might be. They had been trained to lead and not to follow. They were not disciplined to submission. They had been so long in command that they had become incapable of obedience. Unwillingness to submit to constitutional authority was the controlling consideration which drove the Southern states to the desperate design of a revolution, peaceful they hoped it would be, but to a revolution even if it should be one of blood.[1]

Mr. Blaine's theory of the cause of the secession movement appears to be in conflict with that of the previously quoted resolution. The resolution attacks an institution; Mr. Blaine, the men whom it had victimized. According to the resolution, secession or some form of trouble akin to secession was the natural result of the institution of slavery, which "is always and everywhere hostile to the principles of republican government." According to Mr. Blaine, secession was not necessary; it was the wanton act of disappointed, ambitious men. The resolution declares war against slavery; Mr. Blaine, against the slave-holder — not on account of his devotion to slavery, but because he sought to destroy the Union in order to gratify personal ambition. An appropriate consequence of the resolu-

[1] Blaine, Twenty Years of Congress, vol. i, pp. 256, 257.

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tion is the legal destruction of slavery through amendments to the constitution. Mr. Blaine's view justifies the harshest measures of reconstruction, and the spirit of distrust towards the South which, whether justifiable or not, has influenced the policy of the Republican party during much of the period since Abraham Lincoln ceased to be its leader.

The best statement of the Southern theory is given by Mr. A. H. Stephens in the work entitled *The War between the States:*

> Slavery, so-called, or that legal subordination of the black race to the white which existed in all but one of the states when the Union was formed, and in fifteen of them when the war began, was unquestionably the occasion of the war, the main exciting proximate cause on both sides, on the one as well as the other, but it was not the real cause, the *causa causans* of it. That was the assumption, on the part of the Federal authorities, that the people of the several states were, as you say, citizens of the United States, and owed allegiance to the Federal government as the absolute sovereign power over the whole country, consolidated into one nation. The war sprang from the very idea you have expressed, and from the doctrine embraced in the question propounded to me. It grew out of different and directly opposite views as to the nature of the government of the United States, and where, under our system, ultimate sovereign power or paramount authority properly resides.
>
> Considerations connected with the *legal status* of the black race in the Southern states, and the position of several of the Northern states towards it, together with the known sentiments and principles of those just elected to the two highest offices of the Federal government (Messrs. Lincoln and Hamlin) as to the powers of that government over this subject and others, which threatened, as was supposed, all their vital interests, prompted the Southern states to withdraw from the Union, from the very reason that had induced them at first to enter into it; that is, for their own better protection and security. Those who had the control of the administration of the Federal government denied this right to withdraw or secede. The war was inaugurated and waged by those at the head of the Federal government, against these states, or the people of these states, to prevent their withdrawal from the Union. On the part of these states, which had allied themselves in a common cause, it was maintained and carried on purely in defence of this great right, claimed by them, of state sovereignty and self-government, which they with their associates had achieved in their common struggle with Great Britain,

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under the Declaration of 1776, and which in their judgment lay at the foundation of the whole structure of American free institutions.[1]

Again:

The real object of those who resorted to secession as well as those who sustained it, was not to overthrow the government of the United States, but to perpetuate the principles upon which it was founded. The object in quitting the Union was not to destroy, but to save the principles of the constitution.[2]

Further, in discussing the right of a state to secede:

In answer to your question whether she [the state of Georgia] could do this without a breach of her solemn obligations under the compact, I give this full and direct answer: She had a perfect right so to do, subject to no authority but the great moral law which governs the intercourse between independent sovereign powers, peoples, or nations. Her action was subject to the authority of that law and none other. It is the inherent right of nations, subject to this law alone, to disregard the obligations of compacts of all sorts, by declaring themselves no longer bound in any way by them. This, by universal consent, may be rightfully done when there has been a breach of the compact by the other party or parties. It was on this principle that the United States abrogated their treaty with France, in 1798. The justifiableness of the act depends in every instance upon the circumstances of the case. The general rule is, if all the other states — the parties to the confederation — faithfully comply with their obligations under the compact of the Union, no state would be morally justified in withdrawing from a Union so formed, unless it were necessary for her own preservation. Self-preservation is the first law of nature with states or nations, as it is with individuals.[3]

And in comparing the two motives for seceding:

But even the two thousand million dollars invested in the relation thus established between private capital and the labor of this class of population under the system, was but as the dust in the balance compared with the vital attributes of the rights of independence and sovereignty on the part of the several states.[4]

These views are in substantial accord with the two vindicatory pleas which South Carolina sent forth with her ordinance of secession, and with the speeches and writings of Mr. Jefferson

[1] A. H. Stephens, The War between the States, vol. i, p. 28.
[2] *Ibid.*, I, 31. [3] *Ibid.*, I, 496. [4] *Ibid.*, I, 539, 540.

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Davis. They state fairly the Southern theory of the origin and nature of the secession movement. Mr. Stephens concedes that disagreement between North and South in respect to slavery was the immediate cause of the war, but affirms that the underlying cause was the difference of view in respect to the nature of the Union; the North holding that it was national and, therefore, that secession was unlawful; the South, that it was, in the literal sense, Federal, *i.e.* composed of independent sovereign states, which for the sake of the better attainment of common interests had, in the constitution, made certain strictly limited delegations of sovereign powers to the general government, which delegations, however, were revocable at will. The states, while remaining in the Union, retained their original sovereignty unimpaired and had, therefore, the same right to withdraw from the Union which European states have to withdraw from any league which proves injurious to their welfare. The last point is the claim that the interest of the South in slavery was but as "the dust in the balance," in comparison with her interest in "the rights of independence and sovereignty" of the several states.

The difference between the Southern view and that set forth by Mr. Blaine is radical. What Mr. Stephens makes of primary importance, namely, the doctrine of unqualified state sovereignty, the Northern theory altogether ignores. In the one case the motives to secession are represented as among the best, in the other, as among the worst which can actuate human nature. If the controversy concerned history alone we could wait with patience for the verdict of later times; but it concerns also the politics of the present and the immediate future. Obviously the best method of reconciling sectional differences must be based on the true theory of the origin and nature of those differences; and in order to attain this, it is necessary to study the movement which culminated in secession from a standpoint which is neither Northern nor Southern, and in a spirit which cares more for the establishment of the truth than of preconceived political theories.

Looking at the situation in 1860, it is clear that the South

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believed in the unqualified sovereignty of the states, and cared more for the maintenance of this doctrine and the institution of slavery, together considered, than for political union with the North; that the North believed in the national character of the Union, disliked slavery, and was resolved to confine it to the bounds within which it was then established; that the outcome of thirty years of embittered strife was the rupture of the moral bonds which had united the two sections, and the creation of an enmity which every attempt to assuage augmented and intensified. This was the situation. How had it come about? Roughly stated, the unlikeness in character and the hostility of interest between North and South, which we describe by the word sectionalism, were products to which slavery was the chief but not the only contributor. Even in the early colonial period, sectionalizing tendencies appear. During the time while capital was inconsiderable and industry little diversified, climate and soil tended to make the conditions of life decidedly easier in the South than in the North. Later, as the Northern colonists accumulated those resources which lessen dependence upon nature, this difference became less conspicuous, but it had lasted long enough to effect a marked and permanent dissimilarity between Northern and Southern industrial character. A second difference lay in the fact that the social strata were farther apart in the South than in the leading Northern colonies. A third difference was ecclesiastical: in the North, Calvinism, which powerfully stimulates and elevates the democratic tendencies of human nature, prevailed both in doctrine and discipline; in the South, the Episcopal form of church government and anti-Calvinistic dogmas. It should be remembered that in the seventeenth and eighteenth centuries this difference was far more significant than it would be to-day. It is perhaps a consequence of the facts already named that the forms of local self-government assumed in the North a more popular character than in the South. The general conclusion to which the comparison just outlined leads, is that, even during the colonial period, the North came to be considerably more democratic than the South. The divergence thus caused had,

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at the outbreak of the revolution, been increased by the system of African slavery. In the Southern colonies it was strongly entrenched; in the Northern, it had always been subordinate and was declining. The spirit of the period which covers the American and French revolutions was sharply opposed to every form of human bondage. During this, the last quarter of the eighteenth century, emancipation made rapid progress in the North; while in the South, in spite of a widely spread disapprobation on moral grounds, and the active opposition of Jefferson and indeed of many of the leading Southern statesmen of that day, the number of slaves kept increasing. The census of 1790 gave the six Northern states 40,370 slaves — more than half being held in the single state of New York — and the six Southern, 657,527. These figures show that at the beginning of the national period the slave-labor system was dominant in the South, and the free-labor system in the North. The economic disadvantages of slavery had been an important, perhaps the principal, cause of its decline in the North. It was hoped that the same consideration would affect it similarly in the South. But Whitney's invention of the cotton-gin in 1792, by increasing the profitableness of slave labor and therefore of slave rearing, disappointed this hope. At the close of the eighteenth century the economic interests of the South were fully enlisted in the support of slavery.

How did slavery conduce to the growth of sectionalism? It gave to the South an economic character and development wholly unlike those of the North.[1] Under the system of free labor every individual is stimulated to exert himself to the utmost. Under the system of slave labor the reverse is true. The free population soon learns to regard manual toil as servile. It becomes first unfashionable and then dishonorable. The productive capacities of the masses are paralyzed. Poverty and wretchedness ensue. Slavery is responsible too, for the restriction of the South to agriculture. Neither in commerce nor manufactures could it compete with the free labor of the

[1] See the excellent discussion of the economic contrast between the free and slave states in Von Holst, Constitutional History, vol. i., ch. ix.

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North. In agriculture it enjoyed a limited and ever decreasing prosperity solely because of its exemption from unrestricted competition with free labor. This was notably the case with the staples — cotton, rice and sugar. Moreover the cost of transportation gave a species of protection to the bulkier articles of its food supply. It is conceded also that the want of home markets, the costliness of labor and the cheapness of land, led to a system of agriculture which depleted the soil with alarming rapidity. In short, with respect to economic prosperity and the forms of progress most dependent upon economic prosperity, slavery placed the South at a great disadvantage as compared with the free North.

The differences already pointed out led to others. The North, in which labor was honored, attracted multitudes of immigrants; the South repelled them. The immigrants kept the North in close sympathy with the old world and with the democratic movement in progress there. Foreign commerce, which was in the hands of the North, had a similar influence. The increasing hostility towards slavery of the most important states of Europe, particularly England and France, at last made this isolation of the South almost perfect. Isolation led to antagonism. The attitude of the South towards Cuba and the republics of Central and South America; towards the Panama Congress; towards England, in the negotiations respecting compensation for slaves that had been freed in British ports; towards Texas and Mexico; towards Spain and the naval powers of Europe, in the Ostend manifesto, — proved that the South through subjection to slavery had become involved in a conflict with the world.

While this isolation was revealing itself, a social reconstruction was in rapid progress. A tendency to a relatively aristocratic constitution was visible even in pre-revolutionary days. To this tendency the revolutionary period was unfavorable; and we find that in Virginia, for example, under the lead of Jefferson, the legal foundations of the earlier semi-feudal aristocracy were swept away; entail and primogeniture were abolished, and the church disestablished. This democratic triumph was however of short continuance. It is a truism that social as well as politi-

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cal power gravitates to the hands best fitted to wield it. In large part as a consequence of its economic influence, slavery checked the progress of the South towards democracy and re-established the old aristocracy on a new and safer basis. This it accomplished in a very simple way, namely, by depressing the masses. As, through the malign influence of the peculiar institution, the untilled or half-tilled fields of the numerous poor land-holders changed into patches of wilderness, the will and the capacity of their owners to discern and secure their true interests and to make themselves felt in social and political affairs steadily lessened. There were no legal infringements on their status as freemen; but they counted for nothing in the social scale, and their political subordination was complete. The most conclusive proof of their degradation lay in the fact that they could not recognize its cause. In this depression of the poorer non-slaveholding land-owners, the landless free shared. What these classes lost fell naturally to the slave holders. They, a small minority of the free population, became the ruling class, and held their power by the securest of all tenures, namely, a marked and ever increasing relative superiority to the other classes.

To the above, one qualification should be added. On the borders the supplanting of the democratic social and political constitution took place slowly and never completely: for there the influence of free labor continued to make itself felt. Hence the heart of the Southern system was by no means at or near its geographical centre, but in precisely those regions which were furthest removed from contact with free labor.

It is not possible to fix an exact date for the completion of the revolution above described. Indeed, looking at the South as a whole, it never was completed. But the change in question — by which the new aristocracy based on slave labor secured for itself the political control which the masses had wrested from the old semi-feudal aristocracy — was practically achieved during the last quarter of the eighteenth and the first quarter of the nineteenth century. By the third decade of the nineteenth century, not only the economic but the social and political forces of

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the South had been drawn into the support of slavery. One proof of the change in the political and social constitution of the South is found in the fact that, while the South had been full of sympathy toward the first French revolution and had, in common with the North, at times almost forgotten American interests in her zeal for those of the French, she was comparatively little influenced by the second European democratic wave, which first became visible in 1830 and culminated in the general upheaval of 1848. Indeed, the history of the United States presents few contrasts more striking than that between Jefferson and Calhoun in respect to their relationship to the outside world. From the death of Jefferson, in 1826, to 1850 Calhoun was as distinctly the first statesman of the South as Jefferson had been for the previous half century. Jefferson carried his sympathy for the French revolution so far as actually to participate in its work. Calhoun, on the contrary, maintained during the intense excitement of the second revolutionary epoch an attitude of cold, almost unfriendly reserve. On March 30, 1848, in the course of remarks opposing certain resolutions which congratulated the "French nation on the success of the revolutionary struggle," he used the following characteristic words:

> They have decreed a republic. If the French people shall succeed in that, — if they shall prove themselves to be as wise in constructing a proper constitution as they have proved themselves to be skilful in demolishing the old form of government, — if they shall really form a constitution which shall on the one hand guard against violence and anarchy and on the other against oppression of the people, — they will have achieved indeed a great work. They will then be entitled to the congratulations not only of this country but of the whole civilized world.[1]

Each was true to himself and to the South of his day. Jefferson was a democrat, and during more than half of his active life the South made sensible progress towards democracy. Calhoun, politically and socially, was an aristocrat, and in 1848 the South had become altogether aristocratic.

During the administration of Jackson the basis of sectionalism was completed. The South added to her creed two doc-

[1] Calhoun, Works, vol. iv, p. 451.

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trines: one, that the states are unqualifiedly sovereign; the other that slavery is a "good." The early colonists had inherited a love of local self-government and a capacity for its exercise. They came to the new world at a time when a powerful reaction was taking place in England against the despotism of the Stuarts and of Oliver Cromwell. It was owing to their sympathy with this reaction that many, perhaps a majority, of those who shaped the character of the new commonwealth were led to emigrate. The new world fostered these traits and tendencies. The colonists prospered in proportion as they were let alone. Indeed their political activity and, in a certain sense, their political education centered in resistance to the aggressions of the British government upon their rights of self-government. Their relations with one another previous to the revolution showed in general devotion to particular rather than common interests. The French and Indian wars and finally the oppression of the mother country first taught them the necessity of co-operation. The protracted struggle through which their independence was established, enforced this lesson. Separation from Great Britain necessitated national union. As isolated sovereign states, they could not discharge the obligations which independence imposed; they could accomplish nothing for themselves or the world. United in one political organism, they could prosper and do something in promotion of human progress. But conceding that successful revolution involved national union, does it follow that our forefathers perceived and accepted this consequence? If so, how can we account for the particularistic character of the Articles of Confederation — the instrument in which is set forth their idea of the relation of the states? The Articles not only explicitly declare that the individual states are sovereign but provide ample defences against any possible violation of their sovereignty. The government created by the Articles had no power over its presumable subjects. It could not compel a state or the citizens of a state to heed its resolves. A further ground for the conclusion that the framers of the first union did not believe in its national character, is found in

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the circumstance that the Articles were proposed and, after long discussion, adopted before the issue of the war was determined, — a situation the most favorable possible to the development of nationalizing tendencies. The Articles however failed; and the reason for their failure was that they were based on the theory of the unqualified sovereignty of the states. The people recognized the failure, but not its cause. By a peaceful revolution, the constitution framed in 1787 took the place of the discredited Articles. We cannot here enter into the controversy over the question whether the constitution is national or, in the strictly literal sense, federal. The truth probably is, that the majority of the framers were converts to the doctrine of national as opposed to state sovereignty. This is the testimony of Luther Martin and other state-rights dissidents, and, as I think, that of the imperfect records of the convention. The majority of the people on the contrary, as the history of the ratification makes clear, remained faithful to the older doctrine. Deference to the authority of the framers; the understanding that amendments would be added; the great ability, persuasiveness and untiring industry of Hamilton and Madison; and, above all, the conviction that something must be done; — these and other circumstances secured the ratification of a constitution which, to the minds of probably a considerable majority, had created a dangerously strong central government. For a period of about forty years after the first inauguration of Washington, the doctrine of national sovereignty gained ground rapidly. Washington imparted the strength of his own dignity and wisdom to the new government. Hamilton made it vigorous and facile. As the difficulties of the really critical situation were, one after another, met and removed; as the public credit revived and the name American came to be respected and honored, the central government, the recognized source of these blessings, became the real centre of the political interests of the country. Other circumstances favored the change; in particular, the foreign complications which covered the first twenty-five years, and the general prosperity which characterized most of the period. But perhaps no one thing contributed more to the nationalization of

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public sentiment than the accession to power, in 1801, of the Democratic party. Its predilection for the freedom of the individual had made it jealous of the powerful central government and disposed to champion state rights. Its leader, Jefferson, was the author of the Kentucky resolutions, which together with the contemporaneous Virginia resolutions written by Madison, have, to very recent times, formed the charter of the opponents of national sovereignty. Had the party continued in opposition, its anti-national spirit would have increased: as it was, owing to the responsibility of office and the assumption by its opponents, the Federalists, of the task of maintaining state rights, the Democratic party made rapid progress towards nationalization. Proofs of this we find in the purchase of Louisiana, the embargo policy, the declaration of war, important acts of war legislation, the creation of a national bank in 1816, the votes on internal improvements, and the tariffs of 1816, 1824 and 1828. The doctrine of state rights was at its lowest ebb in 1815, when it had to share in the disgrace of its latest expositor, the Hartford convention. In 1820 the contest over the admission of Missouri brought it temporarily to the front. Then it subsided again until, in the administration of John Quincy Adams, the state of Georgia found it useful in securing possession of the territory within her borders held, under the guaranty of the United States, by the Creeks and Cherokees. While this contest was in progress, South Carolina, under the leadership of Calhoun, brought forward the doctrine anew as the basis of nullification. The appeal to state rights in the Virginia and Kentucky resolutions had in no respect a sectional character. The aim was to use the states to protect the rights of the individual against unconstitutional laws of the general government. The aim of the appeal in the case of New England was to protect local interests against the injurious policy of the general government. In this case, however, the grounds of complaint were temporary. In the case of Georgia, the same was true. It is certain that the use of the doctrine, both in the case of New England and Georgia, served to bring it into discredit. In the former case it was associated with alleged dis-

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loyalty; in the latter, with lawless rapacity. The invocation of state rights by Calhoun in behalf of South Carolina bore an entirely different and far more dangerous character. Two features were especially disquieting. In the first place, South Carolina did not stand alone. Her grievance was shared by a group of states, and its source was the diversity of economic interests between them and the Northern states. Its character was thus stated by Calhoun:

> This diversity of interest has already, in this early stage of its political existence, brought us into direct and dangerous conflict on the great questions of trade, of taxation, of disbursement and appropriation, and finally on the still more vitally important question, the nature, character and powers of the general government. Who of any party with the least pretension to candor can deny that on all these points, — so deeply important, — no two distinct nations can be more opposed than this and the other section.[1]

The other and more alarming feature was the fact that the sectionalism recognized by Calhoun was due to slavery and was, therefore, so far as men could then see, permanent. It is important to observe that, independently of the abolition movement, sectional economic interests, which slavery had made unlike those of the North, led the most typical statesman and state of the South to commit themselves to the doctrine of unqualified state sovereignty. Was it not also possible that state sovereignty might become necessary for the protection of slavery itself? For the present there was no danger, but Calhoun saw that it was coming:

> As widely as this incendiary spirit has spread, it has not yet infected this body, or the great mass of the intelligent and business portion of the North; but unless it be speedily stopped, it will spread and work upwards till it brings the two great sections of the Union into deadly conflict. This is not a new impression with me. Several years since, in a discussion with one of the senators of Massachusetts [Mr. Webster], before this fell spirit [that of abolition] had showed itself, I then predicted that the doctrine of the proclamation [Jackson's to South Carolina] and the Force bill — that this government had a right, in the last resort, to determine the extent of its own powers, and enforce its decision

[1] Address to the People of South Carolina (1831); Works, VII, 134.

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at the point of the bayonet — which was so warmly maintained by that senator, would at no distant day arouse the dormant spirit of abolitionism. I told him that the doctrine was tantamount to the assumption of unlimited power on the part of the government, and that such would be the impression on the public mind in a large portion of the Union. The consequence would be inevitable. A large portion of the Northern states believed slavery to be a sin and would consider it as an obligation of conscience to abolish it if they should feel themselves in any degree responsible for its continuance; and this doctrine would necessarily lead to the belief of such a responsibility.[1]

The South could easily accept the new form of the doctrine of state rights, because she had held to that doctrine in its milder forms from the beginning. It would perhaps be just to say, that the South, owing to the relative slowness of her development, had remained much closer to that early condition which was favorable to state rights. Further, the course of the North and West in regard to the tariff and internal improvements had strengthened the conservatism of the South. Strictly speaking, therefore, the conversion was not from national to state-rights doctrines, but from one form of the latter to a more advanced one. Moreover, the theory of the nature of the Union, propounded by Calhoun and widely accepted in the South, implied and asserted the right of secession, but did not make this prominent. It is true that Mr. Davis and others have denied the right to nullify while affirming the right to secede. But this is a difference of detail rather than of principle. The point worth noting is that, almost a generation before the Civil war, the South accepted a theory of state rights which, freely interpreted, made it lawful for any state at any time to withdraw from the Union.

The final act in completing the basis of sectionalism was the acceptance of slavery as a "good." The alleged grounds for this course are given by Calhoun. He thus states the general question:

It would be well for those interested to reflect whether there now exists, or ever has existed, a wealthy and civilized community in which

[1] Calhoun, Works, II, 628.

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one portion did not live on the labor of another; and whether the form in which slavery exists in the South is not but one modification of this universal condition; and finally, whether any other, under all circumstances of the case, is more defensible, or stands on stronger ground of necessity.[1]

After affirming that to destroy slavery "would be to destroy us as a people," he thus proceeds:

But let me not be understood as admitting, even by implication, that the existing relations between the two races in the slave-holding states is an evil, — far otherwise, I hold it to be a good, as it has thus far proved itself to be to both, and will continue to prove so if not disturbed by the fell spirit of abolition. I appeal to facts. Never before has the black race of central Africa, from the dawn of history to the present day, attained a condition so civilized and so improved, not only physically, but morally and intellectually. It came among us in a low, degraded, and savage condition, and in the course of a few generations it has grown up under the fostering care of our institutions, reviled as they have been, to its present comparatively civilized condition.

He adds:

In the meantime, the white or European race has not degenerated. It has kept pace with its brethren in other sections of the Union where slavery does not exist.

But concedes:

In one thing only are we inferior — the arts of gain. We acknowledge that we are less wealthy than the Northern section of this Union; but I trace this mainly to the fiscal action of the government, which has extracted much from, and spent little among us.

He then defends the institution on more general grounds:

But I take higher ground. I hold that in the present state of civilization, where two races of different origin and distinguished by color and other physical differences, as well as intellectual, are brought together, the relation now existing in the slave-holding states, is, instead of an evil, a good — a positive good.

Then, after dwelling on the superior humanity of slavery, he turns to its political influence:

And here I fearlessly assert that the existing relation between the two races in the South, against which these blind fanatics are waging war,

[1] Calhoun, Works, V, 207.

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forms the most solid and durable foundation on which to rear free and stable political institutions.[1]

This was not the earlier view. The most distinguished of Southern statesmen, beginning with Henry and Jefferson, had confessed that slavery was an evil and had hoped for its extinction. Now it was proclaimed as a "good," and the proclamation signified not the beginning but the end of a revolution in the opinions of the South. How had it been effected? The increasing hold of slavery had all along tended to this result. For some time the subjection of the South had been so complete as to forbid the hope that she could ever unaided free herself. History records no instance of an aristocracy which has instituted and supported a movement to overthrow the basis of its own power. But this is exactly what must have happened in the South had she made a voluntary surrender of slavery in 1830 or later. Indeed the only conceivable ways for accomplishing this, — voluntary surrender on the part of the ruling class or revolution from below, — were equally impossible. Interest forbade the former; incapacity the latter. The fact is that the South had fully accepted slavery, and it was inevitable that she should make the best of it; for the tendency of human nature to bring moral standards into harmony with conduct that has been irrevocably resolved upon, is invincible. The abolitionists too, representing as they did the growing antagonism to slavery of the North and the civilized world, had without doubt hastened the process of conversion. It was natural that attacks from without should lead to greater devotion. It is however an error to suppose that the abolitionists caused the South to accept slavery as a "good." That this should take place was, wholly irrespective of the course of the enemies of slavery, inevitable. Moreover no theory dishonors a people more than the one which assumes that in the weightiest matters their views are decided by their resentments.

The acceptance by the South of slavery, not as an evil to be deprecated, but as a "good, a positive good" and "the most

[1] Calhoun, Works, II, 630, 631, 632.

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solid and durable foundation on which to rear free and stable institutions," marks a turning point in the history of the United States. Hitherto the standing ground of the advocates of slavery had been interest; now they advanced to a higher position. If slavery was a blessing instead of a curse, why not defend and diffuse it? This was the logical outcome of the new position, and the South did not hesitate to accept it. The attitude of the South in the defence of slavery underwent a marked change. In the debates over the admission of Missouri, Southern men freely confessed that slavery was a misfortune and urged its extension to new territory on the ground of "diluting the evil." When in Jackson's second administration the debates on slavery were resumed, the old deprecatory, half-apologetic tone ceased. Here again it is important to note the fact that for nearly a generation the participants in secession had been taught that slavery was a blessing, and, consequently, that it was their duty as well as their privilege to defend and extend this blessing.

This brings us to the end of the inquiry as to the origin of the secession movement. Its development, even in outline, is not within the limits of this article. Assuming that the conclusions just reached are correct, let us recall the theories first quoted. That of Mr. Stephens is erroneous because he makes devotion to state sovereignty the primary cause; whereas the truth is that slavery was, for the most part, the cause of this devotion. Peoples care very little for a political or constitutional principle except as it serves their interests: they are not willing to die for a pure abstraction. The only reason why the people of the South adopted, or rather retained and developed, the doctrine of state sovereignty was the security it afforded to Southern interests. But how did they come to have interests which the national theory of the Union endangered? Only through slavery. In proof of the correctness of this view we need but look at the present condition of the South. Since the destruction of slavery and the interests founded upon it, devotion to national sovereignty is displacing almost too rapidly the old devotion to state sovereignty. The South was altogether

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mistaken in her claims respecting state sovereignty. In 1860 state sovereignty did not exist in either section. The South believed otherwise, but her experience during the Civil war made the mistake evident. The Confederate government could not have maintained itself at all except through acts which were emphatic denials of this doctrine. Consequently the South had no warrant for the charge that the North was the aggressor and that President Lincoln inaugurated the war. Mr. Blaine's view is mistaken in that it exaggerates the influence of personal agency. He treats as if altogether voluntary, actions which in great measure were compelled. He lays the entire blame upon those who actually initiated and participated in secession; whereas disunion was inevitable from the moment when the South accepted slavery as "a good"; or perhaps from that earlier time when the South, having ceased to be democratic, came under the rule of the slave holder. Interested motives doubtless had their share in the inception of the secession movement; but there was patriotism also. The event foretold by Calhoun had come to pass; the moral bonds between the sections were broken; we had become "two peoples."

It is difficult to realize the character of the years which just preceded the civil war — how very evil they were! It was the time of the gospel of hate. In the place of the old Union stood the two highly individualized, sharply antagonistic sections. No man could serve the North without incurring the enmity of the South, or the South without incurring that of the North. Nor could a man serve the moribund Union without forfeiting the good will of his own section. This was the real offence of Webster in his 7th of March speech. In that speech he had virtually said: "I care more for the Union than for either section"; and the reply was repudiation by the North and distrust by the South. Henceforth, in what related to the dominant movement of that day, he was an "isolated man." The tragic close of Webster's life is historic because his sufferings grew out of a contradiction, not in himself, but in the situation of the country, — a contradiction which in some measure involved and darkened the lives of every devotee of the old Union. Perhaps in no

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way was the increasingly unwholesome influence of the times more clearly shown than by its effect on the finest natures. It transformed John Brown, in whom were united the better qualities of the patriarch, the crusader and the philanthropist, into a deliberate organizer of servile insurrection; it made "Stonewall" Jackson, in whom religious enthusiasm and patriotic zeal were as strongly marked as his phenomenal genius for war, eager to unfurl the black flag.[1] The situation became intolerable. Terrible as were the consequences of secession, they were far less terrible than the demoralization of character which it brought to an end.

The true cause of secession is that set forth by the Republican convention of 1864. It was slavery that paralyzed the productive energies of the South; that confined her to agriculture, and those methods of prosecuting agriculture which impoverish both land and people. It was slavery that checked the democratic movement, and delivered the South, bound hand and foot, to the rule of the slave-holding aristocracy. It was slavery that isolated the South, that brought her into hostile relations with the progressive outside world, and so obscured her notions of right and wrong, that she could praise as "a good, a positive good," the institution which she had formerly condemned, and through which she was being undone. It was slavery that induced her to develop and maintain, on an ultra-democratic basis, the antiquated doctrine of state sovereignty, and at the same time to attempt to overthrow those foundation principles of democracy, the rights of free speech and of petition. It was slavery that induced her to force upon the general government a policy of aggression, which resulted in a prolonged and desperate struggle for the possession of the newly acquired territory; and, in the course of this struggle, it was slavery that led to those acts which embittered and inflamed the already alienated sections, — the Fugitive Slave law of 1850, the Personal Liberty laws, the overthrow of the Missouri compromise, the bloodshed and terrorism in Kansas, the interferences there against free labor on the part of Pierce and

[1] Pollard, Secret History of the Confederacy, pp. 281, 282.

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Buchanan, the Ostend manifesto, the Dred Scott decision, the attack upon Sumner, the insurrection at Harper's Ferry, and the fatal demand respecting slavery in the territories made at the Charleston convention of 1860. Finally, it was slavery that forced the South, in the interest of self-preservation, to withdraw from the Union. Indeed, after the South was fully committed to slavery, the course which she actually pursued became compulsory. She could not have remained true to herself, had she undertaken to abandon it. But this course led directly and inevitably to disunion; for, between the principle of slavery, which is the right of the strong to the uncompensated services of the weak, and the principle of modern progress, which is the duty of the strong to help the weak to become strong, there is an "irrepressible conflict." The events of 1860 made evident what Lincoln and Seward had foretold, that within the Union slavery was doomed to extinction. But the destruction of slavery involved the destruction of the entire Southern system — a revolution greater than the North would need to undergo in being made over into a copy of the Austrian empire. Effacement no self-respecting people can accept. To escape this, the South was forced to secede. The South is responsible for secession only in so far as she is responsible for slavery. The participants in secession were the victims of those who converted the South to the belief that slavery was "a good."

ANSON D. MORSE.

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STATE CONTROL OF INDUSTRY IN THE FOURTH CENTURY.

BY the middle of the fourth century that centralizing process which had been silently going on in the Roman empire ever since the days of Augustus had reached its consummation. The state had become everything, the individual nothing. All the various powers and functions of the free community had been gradually concentrated in the person of the emperor. In the several departments of administrative, judicial, military and even religious life, not only was all power ultimately derived from him, but an active control was actually exercised by him, through his agents, over the smallest and most trivial concerns. And what was true in the sphere of law, of government, and of religion,[1] was equally true in the field of economics. All industry, from that of the petty colon who tilled the soil to that of the great corporations who had charge of the provisioning of Rome and Constantinople, was under the direct control, and was conducted in the interest of the state. Nay more, the state itself had become producer. It had an almost complete monopoly of all mines, quarries and salt-pits; and while great companies of shell-fishers sought for its sole use the *murex* or celebrated purple dye, its great workshops turned out every year vast quantities of silken, woollen, and linen cloths for the use of the emperor and the army.

This revolution in the nature of the state had not been brought about without effecting a corresponding change in the status of the individual. In the fourth century a man's position was no longer determined by his own free choice, but was already fixed for him by the conditions of his birth. This was true in all departments of life. The son of a senator or a *curialis* stepped alike into the honors and the duties of his father's

[1] See Burckhardt, Die Zeit Constantin's, S. 369, 370.

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position. The son of a soldier was forced to enter the army, and the colon carried on the cultivation of the land tilled by his father. So in the field of industry. The workmen in the state manufactories were bound to their position for life, and when they died their places were taken by their sons. Nor were the members of the so-called "free" colleges of workmen — the architects, builders, locksmiths, stone-cutters, brass-workers, wood-carvers, potters, *etc.* — any less closely bound down. If any one of them deserted his work, he was sought out, even to the remotest provinces, and dragged ruthlessly back to his post. In all departments of industry the iron hand of the state was felt, assigning to each workman his special task and forcing its accomplishment. Never has the world seen the socialistic experiment tried on a grander scale. Only in this case the state was not, as the modern socialistic ideal would represent it, a beneficent power, assigning to each according to his ability his share in the common work and wisely dividing the common product, but a purely selfish power, forcing from each man the maximum of labor, and confiscating for its own purposes the greater part of the fruits. I shall consider presently the causes which brought about this singular state of affairs; but in order to understand them fully, it will first be necessary to consider briefly the nature and history of the Roman colleges of workmen.

The exact nature of the Roman *collegium* is by no means clear. Mommsen himself[1] hesitated to attempt a definition of it. In its later history certainly, it appears to have been a legal person, like our modern corporation, and as such entitled, under certain restrictions, to hold property and to receive legacies. Mommsen[2] likens the *collegium* to a miniature republic — a state within a state — having its own laws for the regulation of its members, its officers elected from the whole body of freemen, and its capital fund recruited both from the dues of the members and from outside sources, of the *income* of which each member received his share (*emolumentum*), but from the *body* of which (*arca*) no one could under any circumstances remove any-

[1] De Collegiis Romanorum, p. 117. [2] *Ibid.*

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thing. The organization into such societies is noticeable in all departments of Roman life, from the sacred colleges of the priests to the *sodalicia*, or political clubs. It will suffice for our purpose to say that the colleges of workmen were associations of members of the same or of similar trades, for a variety of purposes, not industrial only, but social and religious, and of the general nature which has been described above. The origin of these colleges must be referred to a remote antiquity. Their history is practically that of free labor in Rome. It falls naturally into three great periods: the first, that of their early struggles and adversity, extending from their foundation — ascribed to Numa — through the whole history of the republic and well into the days of the early empire; the second, that of their great development and prosperity, reaching its climax in the third century; and the third, that of their stagnation and decline, including the period of state control in the fourth century which is presently to be considered, and ending in their utter downfall in the fifth.

In the days of the republic, the colleges had to struggle under two great disadvantages: first, that general contempt for bodily labor, which characterizes all antiquity; second, the competition of slave labor. The second was the more serious. As the number of slaves increased, they speedily obtained the control of all branches of industry and reduced the free colleges of workmen to the greatest straits. Under these circumstances, the latter became assimilated more and more closely to that class of free and idle proletarians which had been created by the wars and which, living from hand to mouth on the bounty of the state and the gifts of their patrons, became the centre of political disaffection. To this period must be attributed the origin of that disfavor and distrust with which they were regarded by the state, which found vent in the various repressive laws of the senate, and which, even so late as the time of Trajan,[1] had not entirely died away.

By the end of the second century, however, the position of the colleges had completely changed. A great revolution had

[1] Pliny, Epistles, 10, 42.

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taken place in the condition of society. Rome's career of conquest had ceased. The slave-market, no longer recruited by the crowd of captives taken in war, and seriously threatened also by the increasing number of manumissions, no longer presented so formidable a competitor to free labor. Under these circumstances the colleges revived; and the government, finding in them not only a convenient means of regulating the laboring classes in general, but a necessary assistance in carrying on the work of the state, gradually changed its policy towards them. Instead of repressing associations of free labor, it began to encourage them by every means in its power. Alexander Severus is the emperor in whose reign this tendency reached its climax. Under him the college organization was extended to every branch of industry. In every employment freemen and slaves might be seen laboring side by side, and the competition of the former was more and more successful. But it was in the great corporations which had charge of the provisioning of Rome that the college organization reached its greatest development. The providing of food for the poor and idle masses which, even before the fall of the republic, made up the bulk of Rome's population, had been from the outset a cause of anxiety to the empire. To the wheat, which had been distributed gratuitously or for an artificially low price in the days of the republic, the emperors had added oil and meat; and Aurelian capped the climax by substituting for the raw wheat which had been formerly doled out, bread already baked. All this bounty was paid for, of course, by the conquered provinces. Now in order that the collection, transportation, preparation and distribution of the quotas furnished by the several provinces might be successfully and regularly accomplished, the state had need of a thorough and elaborate organization. This it obtained by means of the free colleges. Some of these had already long been connected with the state. Trajan is said to have organized the college of bakers.[1] As early as Hadrian special privileges were granted to members of the *corpus naviculariorum*, who were employed in trans-

[1] See Wallon, Histoire de l'Esclavage, 2me éd. t. iii, note 43.

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porting the supplies of grain.[1] But the organization of this service was probably not complete till the beginning of the third century. A brief survey of its various branches will not be out of place.

There was first the great college of *navicularii*, or shipmen, who were responsible for the transport of the various crops from the provinces to the mouth of the Tiber; there were the colleges of *caudicarii* and *lenuncularii*, or boatmen, who brought the cargoes thus delivered from Ostia to the city; there were the weighers and measurers, who received and verified the crop, the porters who carried it to the storehouses, and the great college of bakers (*pistores*) who, in the two hundred and fifty-four bakeries of the city, turned the raw material into bread for distribution; there were the colleges of *suarii* and *pecularii*, who in the same way provided for the collection, transport and preparation of pork and of beef. Of all these colleges, perhaps that of the *navicularii*[2] attained the greatest degree of prosperity. At first the state farmed out to wealthy individuals the right to transport its crops. The inducement to this enterprise apparently proving insufficient, Claudius placed a bounty on every successful trip. The construction of ships was encouraged by special privileges; and in this way there grew up, partly naturally, partly artificially, a class of wealthy ship-owners, whose chief custom was obtained from the state and who were presently organized into the association which attained such prominence in the third and fourth centuries. This great college did not by any means confine its operations to Rome. Each city and town of any importance through the provinces seems to have had its band of *navicularii*, organized like the parent band of Rome into a college, with its head men elected from its members, and its patrons or *defensores* chosen from among the wealthy senators. Just what the relation was between these smaller companies and the greater one at Rome is by no means clear. Perhaps the simile of Granier de Cassagnac,[3] who compares the position of the college of the *navi-*

[1] Digest, 50, 6, 5, §§ 5–8.

[2] For the history of the *growth* of this college, see Wallon, t. iii, note 41.

[3] Histoire des classes ouvrières, ch. xiii, p. 351.

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cularii in the field of industry, to that of one of the great monastic orders in the middle ages in the world of religion, will serve as clearly as anything at once to give a picture of the prosperity of this great college in the third century and to illustrate the relation which obtained between the whole and its parts.

I have spoken throughout of free colleges. In all the various associations which I have mentioned, as well as in most of the others, slaves might be seen laboring side by side with freemen. In the more powerful colleges, they seem to have been a part of the capital fund of the brotherhood, and were employed in the more menial and degrading tasks. Thus in the Theodosian code the proper furnishing of a bakery was said to comprise "the shop with the beasts, slaves, mills and endowment of land."[1] In the less wealthy colleges, however, — those which were found in the more petty and less remunerative industries, — which had gradually formed themselves from among the members of the continually increasing freedman class, and which at that period had not come into any intimate connection with the state, it seems probable that freemen and slaves were brought into a much closer and more friendly relation. In their midst that process was already rapidly going on, which, continuing its operation through the succeeding centuries on a broader scale, was gradually to assimilate the free and slave classes, and in the common misery which overwhelmed all labor to prepare the way for the total enfranchisement of the latter.

I have said that the prosperity of the free colleges reached its climax somewhere in the third century. Probably, outside of the great colleges of *navicularii, pistores, suarii*, specially favored by the state, this was at its best not too great. The signs of future decay were everywhere apparent. Already the state was beginning to extend over the various branches of industry its blighting control. Yet up to the beginning of the fourth century the liberty of the individual had not been interfered with. The corporations of shipmen and of bakers were, it is true,

[1] "Officinam cum animalibus, servis, molis, fundis dotalibus." Codex Theod. 14, 3, 7.

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more and more strictly held to the performance of their appointed duties. But if the individual *navicularius* or *pistor* was not satisfied with his condition, there was nothing to prevent his changing it. Moreover, even those corporations most closely held to the performance of state services were at liberty, after those services had been performed, to engage in private transactions for their own benefit.[1] With the beginning of the fourth century, however, a great revolution took place in the nature of these colleges. The hand of the state reached beyond the organization and was laid upon the individual. The right of free choice of occupation was withdrawn from him, and the state of affairs created which has been described in the opening sentences. The causes for this change, which affected not the colleges only but the whole of society, must be briefly considered.

They lay in the very nature of the Roman state. M. Blanqui has somewhat naively expressed them in a single sentence: "Les Romains voulaient avant-tout consommer sans produire."[2] For four centuries Rome had been living on the plunder of her provinces; and the provinces, already weakened by the inroads of the barbarians, were becoming more and more exhausted by the drain. The chief weight of Roman taxation fell originally on the cultivators of the soil. Taxes were collected partly in coin, partly in kind. The wheat, oil, pork, mutton and beef used for feeding the Roman populace were derived from the latter source, and for the collection and transport of these the great corporations were held responsible. So long as the provincials furnished the full quota, the position of the corporations was an enviable one and they found no difficulty in filling their ranks. But when, as soon became the case, the provincials, exhausted by the ever increasing loads laid upon them by the necessities of the state, failed to furnish their quota, the corporations were held to make up the deficit.[3] Heavy inroads were

[1] The proof of this is to be found in the various repressive laws passed on this subject by the successors of Constantine. See Codex Theod. 13, 5, 26 and 33.

[2] Histoire de l'Économie politique, t. i, p. 69.

[3] Granier, ch. xiv, pp. 357, 358.

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thus made upon their capital fund,[1] and presently the ranks of the members began to thin. This was only typical of what was going on in all branches of industry. The exactions of the state had eaten the vitality out of everything. The vast sums required for the gigantic system of public works, for the provisioning and amusing of Rome, for the maintenance of the imperial household and for the army, and, above all, the senseless extravagance of the emperors, called for continually increasing revenues; while, on the other hand, both in Italy and the provinces, tracts of land were going out of cultivation from sheer inability of the owners to meet the government exactions.[2] New means for reaping revenue had to be devised. Taxes of all sorts, both direct and indirect, were multiplied. Industry naturally did not escape. As early as Caligula, certain professions had been taxed.[3] Alexander Severus extended this tax to all trades. The momentary prosperity which seemed to open before free labor in the third century presently vanished under the ever increasing weight of this load. Of the nature of the *chrysargyron*, or tax on industry, I shall speak later. I am at present concerned with it only in so far as it was one of the chief causes which rendered the various industries weak and unprofitable. The numbers in the various colleges diminished. In all trades there was manifest a desire to withdraw and join the crowd of idle pensioners in the great cities, whose numbers all the efforts of the various emperors were unable to keep down. The political chaos in which the third century closed added to the general instability. For such a state of things two remedies only were possible: first, the internal or organic, in a total overthrow of the old order of things and the gradual upgrowth of a new society out of the elements of the old; second, the external or artificial, in a mighty revival of the central authority, which should take hold of the halting society from the outside and, lame as it was, compel it by sheer force to walk. The first of

[1] On sources from which this fund was recruited, see Granier, ch. xiii and references.

[2] Codex Theod. 11, 28, 2. See also passage of Eumenes, quoted in Levasseur, Histoire des classes ouvrières en France, t. i, p. 87.

[3] See Levasseur, t. i, p. 74.

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these remedies proved ultimately necessary, — but not until under Diocletian, Constantine and their successors the second had been tried to the utmost and found wanting. It is this second experiment which I am now to consider.

The state of affairs then was briefly this. The weight of taxation was such that in many places it neither paid the farmers to till the soil nor the artisans to continue their industry. Land therefore went out of cultivation and workshops were deserted. Revenues correspondingly diminished. The state then practically said to cultivator and workman alike: Whether it is profitable for you to continue or not makes no difference. The revenues must be paid; and that they may be paid, you must continue to work. And if you will not work of your own accord and for your own advantage, the state will *make* you work for *its* advantage. This statement gives in brief the gist of all the industrial legislation of which the codes are full. It remains to consider how the principle thus laid down was actually carried out in practice. What were the various classes into which the industries of the fourth century grouped themselves, and what were the relations in which each group stood to the state?

In general, the industries of the time may be divided, with special reference to this matter of state control, into two great classes: the first including all those industries which were carried on directly by the state; the second taking in all others.[1] I shall consider each of these classes briefly.

I. *Industries carried on by the state.* — In most of the works which deal with the subject under consideration, I find mines and quarries classed together as largely a monopoly in the hands of the state. A more careful consideration of the laws relating to this general subject leads me to establish a distinction between the two.[2] The mines indeed, which in the days of the republic had been largely in the hands of individuals, had by

[1] The subject of agriculture and the *coloni* lies beyond the scope of the present inquiry. A full discussion will be found in Savigny, Vermischte Schriften, Bd. II, article on the *coloni;* and Rodbertus, Zur agrarischen Entwickelung Rom's.

[2] See, on this subject, Dureau de la Malle, Économie politique des Romains, livre iv, ch. xvii.

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the time of Constantine come almost entirely into the possession of the state. This was especially true of the precious metals, of which it had an entire monopoly. The various marble quarries, however, were still largely in the hands of individuals, and so far from finding any restrictions on their working we meet various laws encouraging the opening of new quarries by private persons. Constantine, in order to secure marble sufficient for his new city, removed the earlier taxes,[1] and forty-three years later we find a law confirming to private individuals the free right of quarrying. The ground assigned is interesting: the emperor believes that free competition will stimulate the discovery and increase the production of marble.[2] Presently, however, the necessities of the royal treasury prove too much for this enlightened policy. In 382, we find a tax of a tenth[3] imposed on the product of all quarries worked by individuals.[4] Finally in 393, by a law of Theodosius, the excavation of marbles by private persons is absolutely prohibited,[5] — thus finally establishing the state monopoly.

Almost all mines were owned by the state. A few seem still to have been owned by private persons; and of those owned by the state, a considerable number were farmed out to private individuals for a fixed price, with the understanding, in the case of gold certainly, that all the product over and above that amount should be handed over, for a fixed compensation, to the treasury.[6] In the case of other metals, as iron and lead, it seems probable that the lessees could dispose of the product as they pleased. A large number of mines, however, were worked by the state itself for its own purposes. The work was done mainly by slaves and the worse class of criminals. Freemen were however employed in responsible positions, as overseers.

[1] Codex Theod., 10, 19, 1.

[2] "Fore enim arbitramur, ut etiam complures saxorum nitentium venae in lumen usumque perveniant." *Ibid.*, 10, 19, 2.

[3] *Ibid.*, 10, 19, 10.

[4] I use the word in distinction from the state; for these quarries (like the salt-pits, which though chiefly owned by the state were often farmed out to private persons) were generally worked by companies of more than one. Digest, 28, 5, 59, § 1.

[5] "Ut fiscalibus instantia locis liberior relaxetur." Codex Theod., 10, 19, 13.

[6] Codex Theod., 10, 19, 3.

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The whole was under the charge of an imperial officer, called the *comes metallorum.* The condition of the workmen in these mines was miserable beyond description. Loaded with heavy chains, they were forced to toil hopelessly at a task compared with which, to the imagination of Pliny the Elder,[1] that of the Giants seemed light. The multitude of edicts requiring the return of fugitive *metallarii*[2] show at once the severity of the laws which bound them to their post, and the impossibility of absolutely enforcing them. The condition of the workmen in the state quarries and salt-pits was probably little better.

There were, however, certain industries controlled by the state which were carried on not by convicts and slaves but, originally at least, by so-called freemen. Some of these led even to certain honors in the state. Such an industry was that of the *murileguli,* or shell-fishers, whose duty it was to collect the *murex,* which furnished the dye for the sacred purple, the use of which was strictly prohibited to private persons.[3] Such were the royal mints, the *fabricae* or arm-factories, and the state workshops of all sorts.

The imperial mints were twelve in number, six in the Eastern empire, and six in the Western. The places of the latter are known to us. One was in Pannonia; two in Italy, of which one was in Rome itself; and three in Gaul.[4] In these mints a part of the precious metal annually turned out by the imperial mines was converted into coin to meet the necessities of the treasury. At the head of each was a royal *procurator* or overseer, who had complete charge of the work and was held personally responsible for all loses and shortcomings.[5] Under him might be found, as in all the imperial workshops, freemen, freedmen, and slaves. Though nominally free the first two classes really constituted a close caste, and were no less strictly bound to their position than the convicts in the mines. Marriage between a *monetarius* and a woman of superior rank was forbidden, on pain of the

[1] Nat. Hist., xxxiii, 21.

[2] See Codex Theod., 10, 19.

[3] Codex Theod., 10, 20, 18.

[4] See Notitia utriusque imperii, with the commentary of Pancirollus, in Graevius, Thesaurus antiquitatum Romanorum, vol. vii.

[5] See Pancirollus on Notitia.

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latter's losing her rank and following her husband's condition.[1] Children of *monetarii* stepped into the position of their fathers.[2] There was but a single exception to this law—an exception granted not to the *monetarii* only, but to the workmen in almost all the state workshops. If any one of them could find a substitute in all respects fitted for the work and willing to assume all the burdens of the position, he might under certain circumstances be released.[3]

The condition of the workmen in the royal arm-shops (*fabricae*) was in many respects similar. Owing to their importance in the imperial system, however, it is possible to learn various additional and interesting details. There were in all thirty-four of these shops, distributed as follows: five in the East, one in Asia, two in Thrace, three in the Pontus, nine in Illyricum, six in Italy, and eight in Gaul.[4] They were situated always in large towns, generally near the chief military stations. We notice a considerable differentiation of labor. Thus at Damascus shields and other defensive arms were manufactured, while the *fabrica* at Irenopolis in Cilicia turned out chiefly spears. The work of each individual *fabricensis* was prescribed for him, and we find laws regulating its amount.[5] The raw material was delivered directly[6] to the shop, and no discretion was allowed the overseer as to its character or amount. Various subsidiary services necessary to the carrying on of the work, such as the preparing and furnishing of charcoal, were exacted from the neighboring townspeople, and formed part of the *sordida munera* of which I shall presently speak. The *fabricenses* proper, like the *monetarii*, were strictly bound to their position. Their marriage was regulated by law, and they were branded on the arm, like recruits of the army,[7] that they might be more easily recognized and recovered if they fled. Their position was however not without its advantages. The workmen of the several *fabricae* were, like the other tradesmen, organized into colleges. Their elected

[1] Codex Theod., 10, 20, 10.
[2] *Ibid.*, 10, 20, 10, § 2.
[3] *Ibid.*, 10, 20, 16.
[4] See Notitia.
[5] Codex Theod., 10, 22, 1.
[6] *Ibid.*, 10, 22, 2.
[7] Codex Just., 11, 9, 3.

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chiefs, after two years' service, received freedom from their duties and were advanced to a certain honor in the state.[1] As late as the beginning of the fifth century it proved necessary to pass a law carefully restricting the right of entrance into a *fabrica* to those who had no other duties conflicting.[2] But this is to be explained rather by the superior wretchedness of the other orders in the state, than by any great attraction in the position of a *fabricensis*. Finally by a law of Theodosius, in 438, the finishing touch is put to the condition of these workmen. "It is provided by law," the emperor declares, "that the *fabricenses* shall be so closely bound to their appropriate duties that, worn out at last by their toil, they shall die in the profession to which they were born — both they and their children after them."[3]

Besides the mints and arm-shops, there were the imperial *gynaecia* or cloth-weaving establishments, *baphia* or dye-shops, *barbaricaria* or shops where the precious metals were worked into artistic shapes, shops where vehicles were constructed for the state transport service, and other establishments of the same general nature. Space will not permit a special consideration of each of these, though their importance in the state economy was great and our information comparatively full. I may say that they were of two general kinds: those which provided for the wants of the emperor and the palace; and those which, like by far the greater number of *gynaecia*, prepared garments, blankets, cloth for tents, and other furnishings for the army. Raw material was furnished for these establishments by imperial officers, called *comites commerciorum*, who, one in each of the great divisions of the empire, bought or collected the necessary silk, wool, purple, skins, *etc.*, and forwarded them to the several factories.[4] In connection with this an elaborate transport service was organized by the state, of which I shall have occasion to speak when I touch on the general subject of transportation.

Before leaving the subject of the imperial workshops two interesting questions suggest themselves. First, as to the

[1] Codex Theod., 11, 9, 2. [2] *Ibid.*, 11, 9, 4. [3] *Ibid.*, 11, 9, 5.
[4] See Pancirollus on *comites commerciorum* in Notitia.

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number of workmen employed. It is impossible to answer this question satisfactorily. The numbers varied greatly. In one case we find in one of the *fabricae* but twenty-seven all told, including slaves.[1] In another case, a revolt of the *fabricenses* seriously alarmed the government.[2] In general it may be said with confidence that these shops employed large numbers both of men and women. A passage of the church historian Sozomen bears interestingly on this point, and incidentally sheds light on the general relation in which these workmen stood to the state. He speaks of the Christian workmen in Cyzicus in the time of Athanasius. These, "being many in number, and divided into two great companies, in accordance with the ordinance of former emperors, dwelt in Cyzicus with their wives and their children, paying each year their appointed quota (*ῥητὴν ἀποφορὰν*) to the treasury, — the first in garments for the soldiers, and the second in newly coined money."

A still more interesting question is as follows. Were these workmen employed merely to satisfy state necessities, like those at Cyzicus, or did the state raise revenue by putting any part of the product of its factories into the market? It is impossible to obtain any definite information on this subject. At first, certainly, the latter was not the case. But various indications point to the conclusion that in the later history of the system the state not only manufactured for its own use, but at least to a certain, and probably to a considerable extent, sold its manufactures.

Besides the natural monopolies enjoyed by the state, and the various state workshops to which I have referred, there were many industries necessary to the successful carrying on of the government, and as such placed under a rigid state control. Such for example were those necessary for the construction and maintenance of public buildings, of roads, bridges and aqueducts. Works of this nature were carried on by special bands of workmen, consisting principally of slaves, — all working under the eye of the state, and like its other workmen bound to their position for life. Assistance in subordinate parts of this work, however, like that of the royal arm-shops, might be required from

[1] Inscription quoted by Levasseur, I, 38. [2] *Ibid.*

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the petty freemen of the neighborhood, and formed part of the *sordida munera* to which they were liable.[1] The transport service was also under the control of the state. This was of a sufficiently elaborate nature, and included several departments. The most important consisted of the *bastagarii*, who had charge of the transport, first, of raw materials to the various workshops, and second, of the finished products to their appropriate destination. The importance of this service to the state being very great, the codes are full of exact regulations concerning the duties and the remuneration of the *bastagarii*.[2] Like the other state workmen, they were organized into colleges including both freemen and slaves, and were fixed to their condition for life. Beside the *bastagae*, or imperial transport service, the transport of the various provisions for Rome and Constantinople required to be carefully provided for. For this service the *navicularii* were responsible in the case of wheat, oil and other substances coming by sea; and the *suarii* and *pecularii* in the case of pork and beef, which generally came over land. I have already spoken so fully of the great colleges which cared for the subsistence of Rome that I may pass over them here without further notice. Constantine introduced the system into Constantinople on a still larger scale. The members were at this time bound to their positions for life. The course of the *navicularii* was carefully marked out for them by law. The right of private traffic had been altogether withdrawn, and the infringement of this law was visited with the severest penalties.[3] Besides the industries already mentioned, there were a number of colleges specially attached to the service of the army,[4] such as those who performed the necessary camp services, provided the food for the men and the grain for the horses, the carpenters, smiths, tent-makers, boat-builders, doctors, *etc.* Still again there were in the larger cities special colleges held to the performance of the more menial municipal services, such as the preparation of charcoal for the public baths, *etc.*

In all these different services, is found the same fixity of con-

[1] Codex Theod., 11, 16, 15.
[2] See Codex Theod., 10, 20.
[3] See Wallon, iii, note 41.
[4] Wallon, iii, note 32.

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ditions. Slaves and freemen share in the work alike; the former in the more menial, the latter in the more responsible positions. But, save possibly in the great colleges of *navicularii*, *suarii*, *pistores*, *etc.*, the distinction has become chiefly a theoretical one. So far as actual liberty is concerned, there is little to choose between the position of the two classes. All are servants of the state, and as such are put under military discipline. Indeed, the expression constantly used in the codes to denote the condition of *navicularius*, *bastagarius* and *fabricensis* alike, is the significant word, "*militare*."

So much then for those industries which were under special and peculiar state control. There still remains briefly to be considered that great mass of so-called "free" industries which stood outside of these, and which furnished employment for the bulk of the population of the empire. The subject is an interesting one, but owing to the lack of exact information, more difficult than the one just concluded. Certain general principles can however be established which, in the short space left me, I shall endeavor briefly to present.

II. *All other industry.* There were two ways in which the state touched the general body of laborers. One was by its taxes; the other by its *munera*. The latter were really taxes, paid in personal service instead of coin. Every workman of whatever sort paid the money taxes; but many of them were exempted from the *munera*. But such exemption, save perhaps in the case of certain learned professions, was only granted in order that the workmen, undivided masters of their own time, might the more readily be able to meet their burden of taxation. We may then in general divide the free workmen of the later empire into two classes: those who paid taxes but were not held to *munera*; and those who not only paid taxes but were liable for *munera* also. It will be necessary to consider each of these briefly. And first, then, what were the *taxes* to which industry was exposed?

The imperial system of taxation was sufficiently complicated. There were various indirect taxes which affected industry, — such as customs duties, a twentieth on all sales, *etc.*, — but the

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main burden under which all industry alike groaned was the *chrysargyron*. This tax, devised by Alexander Severus, had been confirmed and increased by Constantine and fell upon all those engaged in any industry which required a capital fund — not only upon the wealthier merchants, but upon petty tradesmen and artisans of all kinds, save simple day-laborers. The amount of this tax is unknown, but from the complaints of which the writers of the time[1] are full, it must have been very heavy. Its mode of collection was perhaps the worst which the brain of man has yet devised. It was levied at the end of every fourth year, on the arbitrary assessment of collectors chosen from among the workmen by the state. Such was the *chrysargyron;* and while the great colleges of traders and merchants were able for a time to sustain it, and even to attain a certain degree of prosperity,[2] the petty tradesmen and artisans, the *collegia tenuiorum*, were reduced to absolute misery by it; and even the more powerful colleges were soon brought to distress.

The *munera* or personal services due to the state were of various kinds. They were divided into two general classes: extraordinary or honorable, and mean (*sordida*). The honorable *munera* imposed considerable responsibility on the performer and required generally the guarantee of a considerable amount of property. Such were the collection and receipt of taxation for the state, both in money and kind; the receipt and care of city finances; oversight of water supply, of streets, mills and harbors; oversight of the sale of oil and vegetables, *etc.* The *munera sordida* were paid mainly in bodily labor. Thus the petty laborers and tradesmen of the various cities and towns through the provinces might be called upon to supplement by their labor that of the state workmen in the construction and repair of public buildings, the maintenance of the roads and bridges, the clearing of the streets, the carrying of wood, the making of charcoal, and the baking of bread.[3]

[1] See passages quoted by Naudet, Des changements operés, *etc.*, part iii, ch. vi, pp. 215 *et seq.*

[2] So in Gaul; see Guizot, Civilization en France, leç. ii.

[3] Codex Theod., 11, 16, 15.

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The various trades and professions may be roughly divided into three classes with respect to the relation in which they stood to these *munera*. The first class includes all those, whether individuals or colleges, who received immunity from these personal obligations. This class contains, besides members of the learned professions, some thirty-five or thirty-six trades granted immunity by Constantine, — including doctors, architects and builders, stone-cutters, wood-carvers, workers in brass, carpenters, dyers, potters, goldsmiths, carriage-makers, white-washers, painters, sculptors, and in general all those engaged in the more luxurious arts. C. Hegel, in his *Geschichte der Städteverfassung von Italien*,[1] enumerates the immunity granted these colleges above their fellows among the causes for the decay of the empire after Constantine. It must be remembered, however, that all these colleges were still liable to the *chrysargyron;* and I think it more correct to attribute the decline of the arts to the actual burdens which still overwhelmed all alike, rather than to any relief from those burdens, however unequally granted. This view is borne out by the fact that the immunity was not granted to all the members of these colleges promiscuously, but only to the actual working members (*artificibus*); and that even the *artifices*, if they had acquired property sufficient to bear the state burdens, were forbidden to shelter themselves under the immunity granted to their poorer brethren.[2]

The second class of industries were those whose members were liable to the *munera extraordinaria*. Such were the various mercantile and commercial colleges, the traders of various sorts, the wealthier ship-owners and those engaged in river transport, the larger merchants of wine, cattle, leather, *etc.*, and in general all those colleges the wealth of whose members was sufficient to furnish satisfactory guarantees. The third class consisted of the various petty colleges liable to *munera sordida*, such as the petty tradesmen, retail dealers, shoemakers, fishermen, and in general all those coarser handicrafts not included in the list of the thirty-five colleges granted immunity by Constantine.

[1] Bd. I, S. 94.

[2] Digest, 50, 6, 5, § 12.

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Outside of these there was probably still another class, consisting of all those who were not members of colleges at all; such for example as the keepers of petty booths, and laborers working by the day. This class, however, was probably not large, and its condition must have been very wretched. A member of a college had at least his position, such as it was, guaranteed to him. The members of this fourth class might at any moment be seized and set to work in the state workshops or wherever else the central authority might deem their services needed. Any one who worked solely for his own profit was, in the eyes of the state, *otiosus* — an idle man. "Let no one," runs a law of 369, "pursuing his private gain as a retail dealer, a huckster, or a shop-keeper, be suffered to hold aloof from the service of the colleges, if their members seem too few in number."[1] It is not strange, under these circumstances, that the numbers of the fourth class should have been small. The college organization pervaded everything. Like the practice of commendation in the middle ages, it had grown up as a means of protecting the laborer against outside abuses, and ended by becoming the chain which bound him to a more grinding slavery. Through the colleges the state was enabled to reach the individual in a way which would otherwise in such an age have been impossible. For not only did the laws forbid the desertion of their post by all *collegiati* and command the imperial authorities to seek out and return all fugitives,[2] but by establishing a solidarity of interest between members of the same college and holding all the members responsible for the fault of each,[3] they succeeded in compelling the members to control each other.

It was not only by statutes retaining each man in his place that the state strove to control industry. But the subject of state regulation of prices, though interesting, is too difficult and obscure to be entered upon here. It will be sufficient to say that on many occasions the prices of special articles were fixed by law; and once at least, under Diocletian, a general tariff of

[1] Codex Theod., 11, 10, 1. [2] Codex Theod., 12, 19, 1.
[3] Codex Just., 11, 9, 5.

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prices was established, with a death penalty for any one who should refuse to conform thereto.[1] The sincerity of the government was attested by the decapitation of numerous refractory tradesmen; but the attempt met with no more success than such attempts generally do. The state also interfered with the free course of trade, not only by the customs duties to which I have referred, but by the direct prohibition of certain exports, chief among which were gold, iron, salt, corn, wine, and arms.[2]

I have indicated in outline the various means by which the emperors of the fourth century tried to cure the evils which the vicious system of their predecessors, added to their own extravagance, had caused in the economic condition of the empire. Their efforts failed, as in the nature of things such efforts must fail. The remedies applied served only to aggravate the disease. The longer the old organization limped on, the lamer it became, and the more utter and disastrous had to be its final downfall. It is only remarkable, in face of all the evils, external as well as internal, with which it had to contend, that it lasted as long as it did. Of the details of the break-up we know little. But by the beginning of the fifth century the old organization was splitting on all sides. In a law[3] of the year 400, directed to the prefect of Gaul, we read as follows: "Communities deprived of the proper services have lost the splendor for which formerly they were renowned, especially where very many of the members of the colleges, leaving the care (*cultum*) of the cities, and seeking a country life, have hidden themselves in secret and desert places." The emperors, however, were still unable to read the signs of the times. The law continues: "But we have put a stop to such devices (*ingenia*) by commanding that wherever in the world the fugitives may be found, they be dragged back to their duties without a single exception." But such regulations could not much longer retard the inevitable break-up. They are only the last despairing cry of a dissolving system.

WM. ADAMS BROWN.

[1] On this subject, see Dureau de la Malle, livre i, ch. xii; Levasseur, pp. 82, 83.

[2] See Pancirollus, on *comites commerciorum* in Notitia.

[3] Codex Theod., 12, 19, 1.

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REVIEWS.

Geschichte, Theorie und Technik der Statistik. Von AUGUST MEITZEN, Ph.D., Professor an der Universität zu Berlin. Berlin, Verlag von Wilhelm Hertz, 1886. — 8vo, ix, 214 pp.

Jubilee Volume of the Statistical Society, June 22–24, 1885. London, Edward Stanford, 1885. — 8vo, xv, 372 pp.

Le 25 Anniversaire de la Société de statistique de Paris, 1860–1885. Paris, Berger-Levrault et C^ie^, 1886. — 8vo, xii, 444 pp.

Bulletin de L'Institut international de statistique. Tome 1, 1^re^ et 2^me^ Livraisons, Année 1886. Rome, Imprimerie Héritiers Botta, 1886. — 8vo, 288 pp.

There has occurred during the last few years a distinct revival of interest in the study of statistics. This has shown itself in the very successful anniversary meetings of the London and Paris statistical societies, in the foundation of the International Statistical Institute and in renewed critical attempts to define the scope and method of statistics as a science. The four volumes given above are the first fruit of this revival, and — almost a library in themselves — furnish a new and valuable basis for the study of the history, theory, method and practical results of statistics according to the latest scholarship. It is proposed in the following review to point out what this basis is, to explain the modern conception of statistical science and to give an analysis of the new material offered us in these volumes, so far as it is of scientific interest.

The history of statistics[1] is a very curious one. It started as a purely practical branch of administration; developed into what we would now call descriptive sociology; was then differentiated from political science, geography and political economy, and assumed the position of a particular scientific method — or, according to others, of a special branch of social science using a particular method. At the same time its opera-

[1] The first part of Meitzen's book is an admirably clear and concise history of statistics both theoretical and practical. The Jubilee and Paris volumes contain histories of the two societies. The third part of the Paris volume contains an invaluable series of papers by officials describing the statistical bureaux of Europe. See also Neumann-Spallart's history of the statistical congresses in the Jubilee volume, and his opening address before the International Institute at Rome in the *Bulletin*.

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tions have increased enormously, so that its administrative character has returned to it strengthened a hundred fold.

Enumerations of the people are as old as the history of Egypt, Judea, China, Persia, Greece and Rome. Through the middle ages we find statistical surveys of property and enumeration of possessors such as Domesday book in England and the *Grundbücher* of Germany. As powerful states grew up, administrative measures for military and financial purposes demanded statistical knowledge of the resources of the state, and the official statistics were greatly extended. These efforts were encouraged by such monarchs as Louis XIV and Friedrich II, and resulted in the establishment of bureaux of statistics in all the principal European states about the beginning of this century.

In the meantime the purely administrative statistics were brought into scientific form at German universities; first by Conring at Helmstedt in 1660, and later by Achenwall at Marburg in 1746. Statistics, as read by these German professors and their followers, meant what we call descriptive sociology or comparative political science, and included a description by words as well as by figures of all the important institutions of a state. The field was too broad, and the development of political science, political economy, administrative law and geography made the treatment by the older statistical science superficial. The method of description by words was a false one, because it failed to distinguish statistics from history and other branches of social science which covered the same field. The way out of this difficulty was suggested by the mathematicians, who declared that the real mark of statistics was the employment of figures and that description by words was altogether out of place. This certainly served to distinguish statistics from history and from descriptive social and political science, but it left to statistics only the barren and ungrateful task of drawing up tables of figures, without allowing the science to say what those tables meant or proved. The statistician was neither the Paul that planted nor the Apollos that watered the garden of human knowledge, nor was he to enjoy the increase. This view has found favor in England down even to the present day and was expressed as late as 1881 by Mr. Wynnard Hooper in a paper read before the London Statistical Society. Mr. Hooper said that statistics always meant statistics of something, as so many bags of coffee in the London warehouses, and that we could only speak of statistical science in the sense that we can speak of a science of microscopy, — that is, skill in using and manipulating an instrument.[1]

The continental statisticians were not content with this position.

[1] Mr. Hooper has just reiterated these views in the article on statistics in volume xxii of the Encyclopædia Britannica, 1887.

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Under the influence of the talented and enthusiastic Quetelet, — who declared that the regularities of human society, even in such phenomena as crime, equalled the regularities of purely physical occurrences, — they re-vindicated for statistics the position of a science. Quetelet's views, which seemed to set statistics in the place of social science and to destroy freedom of the human will, have indeed been very much modified by later statisticians, who do not assert of social laws that they have the inevitable and unchangeable character of natural laws; but they have shown that the statistician is not merely an enumerator but an investigator in social science, who both chooses his own field of investigation and works out his own results. He does this by the employment of a particular method, *viz.* the statistical.

The statistical method is the observation of numerous instances. This method gives us knowledge of the facts of human society which can be gained in no other way. The facts thus gained are of different kinds. Some are merely descriptive; as for example the number of people on the face of the earth, their increase or decrease, their distribution by age, the birth-rate, *etc.* These are generally of local interest only and their determination cannot raise statistics to the rank of a science. It is mere enumeration. In the second place, statistics give us a clue to certain regularities in the physical life of man which empirical observation would never determine; for instance, the excess of male births over female, the frequency of multiple births, the average duration of life. Finally, statistics are used to show the causal connection between groups of social phenomena; as between illegitimate births and infant mortality, illiteracy and crimes against the person, advanced social position and small families. In order to do all this the statistician must be something more than a tally-sheet. He must be a social scientist. He must know what it is worth while to investigate, what it is practicable to investigate and what truth, if any, is demonstrated by the investigation. It would be logically possible to conceive of the statistician as gathering data on orders received from the social scientist, and then turning these data over to the latter for use, without knowing what was the object of the investigation or explaining the conclusions to be drawn. In fact, statistics are too often treated in this way — as unvarying quantities to be used by any person for any purpose. Experience has proved, however, that the statistician cannot be divorced from the scientist. For unless the statistician have some knowledge of the end to be attained he will work in the dark and perhaps neglect the collation of the very facts which would be of most value. And unless the scientist have some familiarity with statistical methods and previous statistical investigations, he may place false values on the figures or be led astray by accidental regularities or irregularities due to local or temporary causes.

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Modern statisticians, however, differ as to whether statistics, even in this widest meaning, ought to receive the name of a science or whether it is simply a method. The difficulty of calling it a science is that statistics play an important role in so many sciences, both natural and social. We may have statistics in astronomy, in botany, or in meteorology (average temperature, *etc.*). On the other hand, the use of the statistical method in natural science is altogether subordinate; while in social science it occupies by itself a distinct and unique position. In social science it stands by the side of the historical and comparative methods as a third way of gaining knowledge of human life in society. History and comparison of institutions may give me qualitative measurements of cause and effect in the forces governing social life; statistics give me quantitative measurements. But the question of nomenclature is really of very little importance. If history and comparative constitutional law may be termed sciences, so may perhaps statistics. Professor Meitzen ingeniously suggests that it is a branch of applied inductive logic; but even logic is sometimes called a science.[1]

Whether method or science, modern statistics busies itself especially with problems of social science. This is admirably shown by the collections of papers in the volumes of proceedings before us. The favorite field of statistics is the study of population.[2] In scarcely any other direction is there so much room for numerical analysis. Statistics presents the increase or decrease of population; its density and geographical distribution; its distribution by sex and age; the facts about births, marriages and deaths; and even certain physical peculiarities, such as the height of men. Then there are certain facts connected with population of very great interest, such as emigration, education, and matters of similar character.[3] Closely connected with these facts are those showing the economic condition of the people, especially the increase and

[1] The second part of Meitzen's book is an elaborate discussion of statistical method and technique. See also, in the Jubilee volume: Edgeworth, Methods of Statistics; Levasseur, La statistique graphique; Marshall, On the Graphic Method of Statistics.

[2] In the Jubilee volume see: Price-Williams, Remarks on Diagrams illustrative of the Population of London. In the Paris Anniversary volume see: Loua, Les accroissements de la population en France depuis le commencement du siècle; Turquan, De la répartition géographique et de la densité de la population en France; Levasseur, Histoire de la natalité française; Kiaër, La fécondité du mariage. In the *Bulletin* of the International Institute see: Beloch, La popolazione di Roma antica; Perozzo, Della composizione della popolazione per sesso e per età in Italia ed in alcuni Stati esteri. See also, in the Paris volume, Bertillon, La taille de l'homme en France.

[3] See in the *Bulletin* of the International Institute: Dell' emigrazione dall' Italia comparata a quella che avviene da alcuni altri Stati europei; Confronti internazionali sull' istruzione elementare della popolazione.

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distribution of wealth.[1] Finally we have a very active effort to advance statistical science by gathering international statistics and making them comparable with one another.[2] It is only in this way that statistics can ever discover social laws; and it is to be hoped that the new Statistical Institute will accomplish in this direction what the old statistical congresses aspired but failed to do.

The modern conception of statistical science is, therefore, that it is a branch of social science employing a particular method. This method is to be used with scientific care and subjected to the most rigorous analysis and criticism. It is then to be applied to the phenomena of human life so as to give us knowledge of society and of social laws. Observations are to begin in single countries and for particular purposes, but are then to be made international and extended to all domains of social life capable of observation in this way. The mass of knowledge thus obtained, the truths disclosed by this knowledge and the scientific appreciation of the method will constitute a statistical science.

RICHMOND M. SMITH.

Les Salaires au XIX^e Siècle. Par ÉMILE CHEVALLIER. Paris, Arthur Rousseau, 1887.

This work of 300 pages received the prize of 2500 francs in 1886 from the French Academy of Moral and Political Sciences as the best work submitted on wages, the subject assigned for the competition. It impresses the reviewer, after careful reading, as the ablest work on the subject since Walker's *Wages Question.*

The first half of the book is devoted to a close study of a vast mass of facts bearing on the height of wages and cost of living in the last three centuries, but particularly since 1820, in France, Germany, England, the United States, and Australia. The figures in most cases are not new; but as regards France, M. Chevallier presents from his own

[1] See in the Paris volume: Fournier de Flaix, L'accroissement de la richesse depuis 1789 en France, en Angleterre et en d'autres Etats; Leemans, Quelques progrès en Belgique; Juglar, Des retours périodiques des crises commerciales et de leurs liquidations. In the *Bulletin*, see: Foville, La statistique de la division de la propriété en France et dans la Grande-Bretagne; Sbrojavacca, Sul valore della proprietà fondiaria rustica e sulla gravezza delle imposte che la colpiscono in alcuni Stati; Rauchberg, Die Entwickelung des Clearing-Verkehrs.

[2] See in Jubilee volume: Jeans, on Uniformity of Statistics; Körösi, on the Unification of Census Record Tables; Körösi, Mémoire relativement aux décisions des Congrès Internationaux de Statistique, concernant le questionnaire international des recensements. In the *Bulletin* see: Rawson, International Statistics, illustrated by vital statistics of Europe and of some of the United States of America. Many of the papers already cited are international in character.

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studies many new and interesting tables. It appears from these, — the accuracy of which we have no means at hand for testing, but which are doubtless in the main correct, — that wages in France have more than doubled during the present century and have increased with especial rapidity since 1850, while the cost of living as a whole is not now much greater for the same quality of food, clothing and lodging than in 1800 or 1820. Rents have increased, though not at an equal pace with wages; the price of clothing has diminished; and that of food has not materially changed. A great though less rapid increase of real wages is noted in the other countries considered.

One of the most interesting facts brought out in these tables is the great levelling up of wages. The rewards of the more poorly paid occupations have increased in a far greater ratio, since 1820, than those of the better paid. The wages of women have increased faster than those of men; and the average earnings of the poorly paid workmen of Spain, France and Germany have grown faster than those of the better paid laborers of the United States.

M. Chevallier shows that in France, as elsewhere, the wage earners have employed this gain in three ways: to improve the quality of their food, lodging and clothing; to satisfy new needs; and to invest in various institutions for savings, such as banks and insurance companies. Since 1835 the number of depositors in the French savings banks has increased from one in two hundred and fifty inhabitants to one in eight, and the amount of deposits from 4,704,452 francs to 2,025,280,640 francs.

The last half of *Les Salaires* is devoted to a study of the causes that influence wages. It is recognized that it is not sufficient to fall back upon the old formula of demand and supply; that it is necessary to determine what causes affect the demand and what the supply, and to consider the potent disturbing influence of custom and law. Our author believes that wages have as a maximum the full product of the labor after deduction of necessary expenses, and as a minimum the amount needed to support the workmen in that standard of comfort to which they have become habituated. Labor organizations and the demands common to the mass of the workmen assist in raising wages above this minimum. But, after all, the greatest rise in wages in general comes from the increased productivity of work, whether that increase be due to better machinery or to more skilful workmen. So, for example, farm labor earns more in summer, when it is most productive; whereas, if Lassalle were right, it would receive more in winter when the bodily needs, the expenses of living, are greater. There are however so many exceptions to the above view — that better machinery will raise wages — that this part of M. Chevallier's treatise seems weaker than the rest.

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The author also holds that the mere increase in the general riches of a country tends to raise wages; *e.g.* servants are paid more than a generation ago. He considers this in part due to democracy, which has rendered personal service offensive to a large part of our wage earners.

The greatest weakness of the book is the very inadequate treatment of labor organizations. Their widespread systems of out-of-work, accident, sick, travelling, death, loss-of-tools and other benefits, aside from the strike fund, are scarcely noticed; and our author seems entirely ignorant of the great economic justifications of the principle (not the abuses) of trades unions contained in Brentano's *Arbeitsverhältniss*.

M. Chevallier believes with Bastiat and Edward Atkinson that wages are not only increasing absolutely, but relatively to the rewards of capital; but gives no facts in proof of this very doubtful assertion. Taking our census returns of capital invested in manufactures for what they may be worth, we find that according to them the total amount spent for wages increased 22.2 per cent from 1870 to 1880, while the capital employed increased 31.7 per cent; so that, even if the profits fell from 10 to 9½ per cent, the aggregate returns from capital increased 25.1 per cent or 2.9 more than wages.

But despite these defects, M. Chevallier has presented his results lucidly and ably; and his work is of importance to all students of the labor problem.

EDWARD W. BEMIS.

Emigration and Immigration: Reports of the Consular Officers of the United States. Washington, Government Printing Office, 1887. — 8vo, iv, 748 pp.

Statistica della emigrazione italiana per gli anni 1884 *e* 1885 *con notizie di legislazione e statistica comparata.* Roma, Tipographia della camera dei deputati, 1886. — 8vo, xlviii, 476, 76, lxxxiv pp.

Copy of Memorandum on the Immigration of Foreigners into the United Kingdom, with Appendix containing Statistical Tables and other Information. Board of Trade, April, 1887. London, Hansard and Son. — Folio, 16 pp.

The clamor which has arisen during the last year or two on the part of the laboring men of this country for restriction of immigration has led the Department of State to collect reports from consuls all over the world in regard to this subject. These reports are supplemented by various tables and charts showing the number of immigrants since 1820, their nationality, sex, age, and occupation. The whole is introduced with a valuable commentary by Mr. Worthington C. Ford, the statistician of the department.

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The letters of the consuls of the United States are not very lively reading, and in the majority of cases are not worth reading They contain, however, a certain amount of valuable information taken from official documents; for instance, we have in these reports tables of statistics of emigration from different countries, translations of the laws regulating the treatment of emigrants, copies of the circulars of colonization offices, *etc.* Beside these things the consuls have answered some questions intelligently and in such a way as to throw light on some phases of the subject. It appears by a general consensus of opinion that there is no attempt on the part of European governments to get rid of their idiots, criminals and paupers by sending them to us. In fact the attitude of all the continental governments is hostile to any sort of emigration. The reverse is the case only in Great Britain, where assisted emigration has been grasped at as a solution of the Irish problem. Practically the only state assistance is to *im*migration, and comes from Canadian, South American, and Australian colonization agencies; and this is not on a very large scale. In New South Wales the largest number of state assisted immigrants was 8,369, brought over in 1883. That same year 58,837 came at their own expense. Even this help is now being withdrawn, owing to the opposition of the populace in Australia. The real assistance to emigration is not state but private — *viz.* remittances from friends and relatives who have gone before. It is for this reason also that the direction of emigration remains about the same from year to year.

On the causes of emigration the consuls do not throw much light. The increase or decrease depends more on the facilities for transportation and the attractiveness of the foreign country than upon any hardships endured at home. The emigrants are still most largely from the agricultural class or are unskilled workmen. With the exception of the Hungarians, Bohemians, and perhaps the Italians, it does not appear that the emigrants are of such a character as to endanger our civilization; and the Italians go principally to South America. Mr. Ford in his introduction makes a careful analysis of the occupations of immigrants, showing that only ten per cent are skilled laborers. The statistics are not altogether satisfactory; but the result shows that the indiscriminate denunciation of immigration by the present labor organizations is mostly mere demagogy.

The Italian report on emigration affords an opportunity to call attention to the very valuable work which the Italian bureau of statistics is doing for all who have occasion to use international statistics. In this instance, the bureau has not only investigated Italian emigration, but has also made a digest, from official sources, of laws regulating emigration and immigration, and finally presents tables of emigration from

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all the different countries of Europe, with details as to destination, sex, age, occupation, *etc.* The advantage of these tables over those in the American report is that they are compiled by expert statisticians from official documents and the figures rendered comparable with each other.

Italian emigration itself is either temporary or permanent; that is, either to neighboring states or to non-European countries. The former occurs on the Austrian, Swiss and French frontiers, and consists of Italians who cross the border at harvest time and return later. It numbers from 80,000 to 100,000 persons per annum. Permanent emigration reached its highest figure in 1885 — 77,629 — a very rapid increase since 1878, when it was only 18,535. The increase has been more rapid in the South than in the North, owing probably to increased facilities and cheapness of transportation from Naples. The South-Italians are of course a much lower and poorer class than those of the North and the change is not an agreeable one for the countries that receive them. The stream of Italian emigration, however, is directed to South America (the Argentine Republic); the United States and Canada getting only 16½ per cent of the emigrants in 1885. The emigrants are principally farm laborers and shepherds, who find employment on the cattle ranches of the pampas. The cause of emigration, according to the Italian investigation, is simply the hope of bettering their condition. The international statistics are valuable and complete. Altogether the volume is the best collection of statistics of European emigration that we possess and leaves little to be desired in the way of a scientific *exposé* of the facts themselves.

The Memorandum of the English Board of Trade is mentioned here only as a curious example of how circumstances alter cases. For years Englishmen have advocated emigration, but the moment immigration begins to affect them they cry out in dismay. To an American, the cause of the outcry seems petty enough. The total number of foreigners living in the United Kingdom was only 110,000 in 1881, and the increase in ten years was only 10,000. Still, we do see exhibited on a small scale what our laboring men say will happen in the United States unless we restrict immigration. The influx of German bakers into London is so great that Englishmen are being gradually forced out of the trade. There are 4,000 master bakers in London and of these 2,000 are Germans. German labor, especially when newly arrived in London, is cheaper than English, and the tendency is therefore more and more to throw the entire baking trade of London into German hands. The same thing is true to a less extent in other trades. The whole thing is a neat little illustration of one part of the present immigration problem.

R. M. S.

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Die Grundlagen der Karl Marx'schen Kritik der bestehenden Volkswirthschaft. Von Dr. GEORG ADLER. Verlag der Laupp'schen Buchhandlung, Tübingen, 1887. — 294 pp.

This is the most important and thorough-going criticism of Marx's theory which has yet appeared. It begins with a statement of his materialistic views of historic progress. These are to be found chiefly in his earlier writings, *viz.*, *La Misère de la Philosophie, Der Kommunistische Manifest,* and the articles written for the newspapers and periodicals with which he was editorially connected previous to 1850. The author then states fully the economic doctrines contained in *Das Kapital* and subjects them to criticism. He admits, with Schäffle and Wagner, the possibility of reducing different kinds of labor to an average expressed in the form of socially necessary labor-time. He thinks also that Marx has rendered a service to economics by substituting for labor the term labor-power. But the theory that labor is the only source of value is proved to be false by a comparison of the values of commodities which in the process of their production have passed through an unequal number of stages. The percentage of profit upon capital invested, reckoned according to time, is an element whose existence cannot be accounted for under the socialistic hypothesis.

Of course, if the doctrine that all value is derived from labor is overthrown, Marx's theory of surplus value falls with it. But Dr. Adler goes further, and argues that the theories are mutually contradictory. Surplus value really includes profits, interest and rent, as well as the increment added by labor. Therefore, when brought into actual practice, the doctrine of surplus value itself would force us to the conclusion that commodities are ever exchanging for more or less than their values expressed in the terms of labor. Therefore the one theory excludes the other: if the one be true, the other must be false. The gross error contained in the argument of Marx that profit arises only from that part of capital which is consumed in the payment of wages, is also exposed. Upon that supposition, it would make no difference how much England pays for her raw cotton, or any manufacturer for the buildings and machinery of which he makes use. In this way the author shows the inadequacy of the theory of surplus value to explain the phenomena to which Marx seeks to apply it. It is proven that in all his writings Marx shows a strong tendency to force facts into conformity with his theories, rather than the reverse.

The latter part of this work consists of a series of studies upon the literary life of Marx. It is shown that the central thoughts of his system had been stated by many before he uttered them; but to the great socialistic thinker belongs the honor of developing them. He was

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driven to the study of economics and the advocacy of socialism by the act of the Prussian government in closing the office of the *Rheinische Zeitung* at Cologne, of which he was the editor, in 1843. The author very satisfactorily proves that Marx was influenced more by the writings of Proudhon than by those of any other socialist, although he afterwards severely criticised him. The *Communistic Manifesto* is regarded as the best specimen of his writing — a masterpiece in itself.

In Dr. Adler's book the thought is newly brought out and enforced, that Marx was a man who dealt largely with abstractions, whose mind was full of crude generalizations. These he published with all the assurance of ascertained truth. His writings are full of prophecies of uprisings and revolutions which have never come to pass. His theory of historic progress was that in all human institutions are contradictions which produce conflict, and that this ends in the collapse of the old and the rise of a new system. Therefore he regarded the overthrow of the existing social order as certain, whether means were adopted to hasten it or not. Yet his life was spent in agitation, though he never organized a permanent movement. Marx is shown to have been inferior to Rodbertus as a thinker, and to Lassalle as an organizer and leader.

H. L. OSGOOD.

The Theory of International Trade with some of its Applications to Economic Policy. By C. FRANCIS BASTABLE, M.A., Professor of Political Economy in the University of Dublin, *etc.* Dublin, Hodges, Figgis & Co.; London, Simpkin, Marshall & Co., 1887.— 163 pp.

An exceptional interest attaches to a work on international trade emanating from Dublin. According to one theory, Ireland is a country that imperatively needs the benefit of a protective tariff; while, according to another, it is the country in which such a measure would work nearly a maximum of harm. It is small, poor, agricultural, and separated only by a hedge and a ditch from the commercial and manufacturing centre of the world. This set of conditions is made to do duty in both directions, in discussions of the protective policy; and should that policy be tried, the experiment would afford a striking object lesson on a controverted subject.

It would be unjust to Professor Bastable's work to characterize it as simply a treatise on protection. It is called by its author "an attempt to restate, in a more complete form, the doctrines of the classical English school on an important and difficult branch of political economy" — that, namely, of international trade. The method of the work is classical, as well as its conclusions; it is almost wholly deductive. It

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proceeds from assumed conditions so simplified as to resemble the facts of life only at a single point, and gradually introduces complicating elements until the essential conditions of actual trade are included in the calculation. In clearness, conciseness and essential completeness it is among the best illustrations of "progressive orthodoxy" in economic discussion.

"Nations," in the sense in which the term is used, are "societies" or groups of producers locally defined, "which exchange commodities, but between which industrial agents do not pass." The population of any territory about which there exists a barrier that prevents the migration of capital and labor, except in a limited way and under the influence of extraordinary inducements, constitutes thus an economic nation; and this local group may be divided into sub-groups that stand in a similar non-competing relation to each other.

The motive to international trade, like that which prompts to exchanges between individuals, is shown to be a gain in utilities and a saving of sacrifices; the parties get more and work less by reason of the transactions between them. The principles according to which this gain is shared are stated with exceptional clearness. It is shown that the gain must be realized where international transactions assume the character of barter, exports balancing imports; and it is then demonstrated that the use of money does not vitiate the conclusions which, in this particular, are reached by the hypothesis of a purely barter relation. The flow of money from one nation to another operates on prices, and in an indirect way brings about the "equation of reciprocal demand," or balance between exports and imports, which necessarily results when goods are exchanged directly for each other. It is perhaps a weakness of the argument that it assumes somewhat lightly the fact of this relation between the supply of money in a particular nation and the prices there prevailing. The familiar fact is indeed cited, that changes in the rate of discount by London banks bring about changes in the prices of securities and also of merchandise; but the discussion is intended to apply to all nations; and it is not self-evident that the rule prevailing at London will hold true everywhere; neither is it self-evident that, in all cases, the rate of discount is a certain indication of the total amount of money in a country.

The preliminary demonstration of the gain that is inherent in international trade enables the reader to approach the study of protective tariffs from a direction opposite to that from which, in popular discussion, an American is usually invited to approach it. Manufacturing for a home market is, in this country, usually made to appear inherently desirable, and foreign trade to that extent undesirable. The book has therefore an especial interest for American readers. It is unnecessary to

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say that the conclusions reached are unfavorable to a protective policy. The candor of tone and clearness of thought and statement which characterize this part of the work will probably make it appear, even to protectionist readers, as a new illustration of the faultlessness of the logic of free trade as a permanent international policy.

JOHN B. CLARK.

Die Abgaben, Auflagen und die Steuer, vom Standpunkte der Geschichte und der Sittlichkeit. Von Dr. WILHELM VOCKE, geheimer Oberrechnungsrat. Stuttgart, J. G. Cotta, 1887. — Large 8vo, xxvi, 625 pp.

L'Impot sur le Revenu: Rapport fait au nom de la Commission du Budget. Par YVES GUYOT. Paris, Guillaumin et C^ie^, 1887. — 12mo, xii, 347 pp.

So extraordinarily rich has the literature on the science of finance become during the past few years as to call for the publication, in Germany at least, of a separate journal devoted entirely to its interests. The attention of all continental countries has been increasingly directed to the much needed and projected reform of the systems of taxation, and it is to this branch of the science accordingly that the best abilities of the investigators have been devoted. Among the books of the year, the two works here reviewed occupy a commanding position.

Dr. Vocke in *Die Abgaben, Auflagen und die Steuer* treats the subject in a somewhat peculiar way. After having won his spurs over a quarter of a century ago by his *History of English Taxation*, at that time the most meritorious work on the topic, the venerable doctor here attempts to find the moral basis and relative justification of the various taxes. The chief problem which he sets out to solve is that of the exact difference between direct and indirect taxation, and the conclusion to which he comes is at all events novel and suggestive. In an introductory book Vocke traces the literary doctrine of the basis of taxation in general, and divides the authors into three schools: the representatives of the contract or protection doctrine, including most of the earlier English and French works; the group which emphasizes the sovereign nature of the state and the duties of the subject, but without any deeper historical insight; and finally the social-political writers who, like Held, Schäffle and especially Wagner, attribute to the state a compensatory duty in making taxation an engine to remove the inequalities of fortune. Vocke strongly objects to the latter as involving a dangerous socialistic tendency, and asserts that such considerations do not appertain to the science of finance at all. But in none of these schools, nor in the works of the "independent" writers, such as Neumann, Stein or Roscher, does

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he find an answer to the great question: What is the ethical basis of direct as compared with indirect taxation?

An answer is possible only through a study of the historical development. With characteristic German thoroughness, but with what seems unnecessary detail, Vocke begins with a psychological analysis of the individual and traces the evolution of his economic condition and qualities through the family and tribe to the state. In the patriarchal stage, as in the family, the contributions of the individual to the support of the whole are compulsory, universal, and proportional to the ability or property. In the feudal state the contributions of the vassal take the shape of personal services and payments in kind, afterwards converted into money payments. But now begin the customs and duties, the fees and tolls, the excise or evil duty (*malum toltum*), all of which rest primarily upon power, upon the imperious necessities of the over-lord. The legal basis is the presumptive princely prerogative, the *imperium*, in other words naked force. Quite different from these veritable impositions are the taxes proper. Beginning as the *trinoda necessitas*, aids and contributions, they soon develop into poll, property, and finally into profit taxes. These taxes, properly so called, rest on voluntary contributions, not on mere force; they are universal, not special; their standard is personal ability, not mere expediency. In the tax there is a moral quality, in the customs and excises there is none.

This is the keynote of Vocke's book. The tax proper in its historical genesis is the direct tax, and connotes certain ethical ideas; the indirect taxes are properly not taxes at all but imposts, and carry with them no moral appreciation. He makes a careful study of the development of indirect taxation in the next political form, — the absolute monarchy, — and shows very prettily how and why the basis of direct taxation was changed from property to product (*Ertrag*). The remaining two-thirds of the work are devoted to a consideration of taxation in the actual or constitutional state. But the point of view has been won, and the future reform must proceed in the path of elaborating the direct taxes and of curtailing the indirect taxes.

Vocke's book may be termed a study in the philosophy of taxation. It contains no figures, and but few facts. The author's contention as to indirect taxation may be met by the reflection that justice cannot be the sole maxim of taxation. The chief point is to balance the budget, and some taxes which are technically just may be practically unremunerative and therefore unserviceable. But from the standpoint of pure morality Vocke seems to have established his doctrine of indirect taxation, and will serve as a useful antidote to such flimsy and superficial thinkers as McCulloch, who still in great part dominate English views in the science of finance.

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M. Guyot in his *L'Impôt sur le Revenu* sets himself a different task. The critics of the French system of taxation have always contended that personal property is exempted to an excessive extent, and the income tax has been repeatedly proposed as a means of curing the defect. M. Guyot was requested by official authority to investigate these propositions for an income or a general property tax, and furnishes in this report a noteworthy addition to the studies made quite recently by Menier, Denis, and Chailley on the same general subject. The report is one rather of description than of analysis, and the various parts are of quite unequal value. The description of the English income tax is neither detailed nor satisfactory, in so far as the exact methods of administration are concerned. Attention is called to the familiar fact that the English system is not a tax on income, but on incomes, and that with the exception of schedule D (income from commercial pursuits *etc.*) it may well be compared with the *contribution foncière* and *personelle et mobilière* of France. The description of American taxation is absurdly inadequate, and Germany does not fare much better. On the other hand the working of the great Italian law of 1877 on income of movable property is fully explained, and a peculiarly valuable chapter is devoted to the income and property taxes of the Swiss cantons.

M. Guyot is not a partisan of the income tax; he advances the common argument of the inquisitorial character of the tax, and discusses very superficially the questions of progression and degression *versus* proportionality. The history of the various projects from 1848 onward, however, is well written and interesting. Guyot, like Vocke, thinks that France committed a grave mistake after the Prussian war in increasing the indirect rather than the direct taxes. He leans toward a general property tax, like that advocated by Menier; but in discussing the objection that the valuation is attended with great difficulties, he says: "La pratique des États-Unis et de la Suisse répond encore à cette objection." I fear that this rosy view is caused by an entire ignorance of American methods and results. It shows the extreme danger of general analogies, and tends to make one sceptical as to M. Guyot's other propositions.

The practical outcome of the report is a proposal to reform the property taxes. According to the French parlance, a difference is made between *l'impôt de répartition* and *l'impôt de quotité*. In the former the law fixes the total sum to be raised, and divides (*répartit*) it among the departments, each of which again apportions it among the communes. The commune then apportions its share among the individuals. In the latter, the proportion of each taxpayer is rated at a fixed percentage (*quotité*), and no minor subdivisions take place. The land tax as imposed in 1790 is one of *répartition*. As a consequence, already in 1821 the division between the departments and communes was so unequal

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that in some cases the tax amounted to one-sixth, in others to one-seventeenth of the rent or income. A general valuation or *cadastre* was begun in 1808 but not finished until 1851, and in the mean time the valuation has again greatly changed, so that at present the amount of tax paid varies from one to twenty per cent of the rent. As a sole escape from this crying inequality Guyot demands a conversion of the land tax into an *impôt de quotité*, in order that each plot may bear its proportionate burden. He would moreover have the tax levied on the capital value rather than on the rent or annual value. A similar reform is suggested for the tax on personal property (*la contribution personnelle et mobilière*) which since 1832 has been one of *répartition*. These changes, together with an abolition of the duties on the transfer of land, amounting at present to ten per cent of the value, would in Guyot's opinion result in a far more equable and remunerative fiscal system and would serve as an introduction to still greater and more important reforms. The student of comparative taxation will find in the volume many useful hints.

EDWIN R. A. SELIGMAN.

Lehrbuch der Nationalökonomie. Von Dr. LORENZ VON STEIN. Dritte umgearbeitete Auflage. Manz'sche Buchhandlung, Wien, 1887. — 457 pp.

The object of the learned author of this work, which now appears in a third edition, has been to develop the science of pure economics out of the conceptions of nature and personality, and to show the relation which it bears to the broader realms of sociology and the science of administration. He holds that law is developed out of economic conditions, and that these conditions are fundamental and lie at the basis of all legal as well as social changes. This work therefore is a fitting introduction to the author's great system of administrative law. With characteristic logical exactness, he would confine economics to the consideration of the phenomena of competition, holding fast to the results arrived at by the best writers of the English school; while he would treat of the modifications and restraints which must be introduced by the state, in order to secure the highest well-being of the individual and of society, under administrative law.

This book, like all which its author has published, is full of large views and rich thoughts, but it is made needlessly difficult by a philosophic nomenclature and form of treatment characteristic of the Hegelian school. Indeed the writer frankly admits, after laboring through nearly one hundred pages in the effort to construct a philosophic basis for his work, that it may all be discarded if the reader will but retain the idea of personality. Still the broad conceptions of human nature, of labor,

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of the beneficial and harmful tendencies of competition, of the relations of economic activity to the other and higher forms of human effort, make this a very suggestive work. Its views in their practical outcome are substantially in harmony with those of Schäffle. Both, though from different standpoints, emphasize the reaction against the narrow and materialistic doctrines of the Manchester school.

H. L. OSGOOD.

American Statesmen. The Life of Henry Clay. By CARL SCHURZ. Boston, Houghton, Mifflin & Co., 1887. — 2 vols., 12mo, 807 pp.

We have in this life of Henry Clay a biography of one of the most distinguished of American statesmen, and a political history of the United States for the first half of the nineteenth century. In each of these important and difficult undertakings, Mr. Schurz has been eminently successful. Indeed, it is not too much to say that, for the period covered, we have no other book which equals or begins to equal this life of Henry Clay as an introduction to the study of American politics. The tone throughout is scholarly, unpartisan and morally wholesome. Its standpoint is American, but so elevated as not to permit the reader to lose sight of the rest of the world. The art is admirable, the writer is fully master of his material, and in his use of it shows that he possesses in a high degree the trained literary instinct. The result is lucidity. This is apparent everywhere. The division into chapters and their titles reveal it, but its best expression is found in the accounts of critical situations like those which led to the compromises of 1820, 1833, and 1850. There is here nothing of the distortion and obscurity which characterizes the work of the partisan. In the treatment of the slavery controversy, and in the account of the bank struggle, the same nice sense of proportion and the same felicity of statement are noticeable.

The writer does not by any means confine himself to mere narrative. In the chapter on the compromise of 1820, he asks "whether those who accommodated the Missouri quarrel really did a good service to their country"; and, after a luminous discussion of the evils of the compromise, and of the dangers of a refusal to compromise, reaches the conclusion that

> An attempt by the South, or by the larger part of it, to dissolve the Union would therefore, at that time, have been likely to succeed. There would probably have been no armed collision about the dissolution itself, but a prospect of complicated quarrels and wars afterwards about the property formerly held in common, and perhaps about other matters of disagreement. A reunion might possibly have followed after a sad experience of separation. But that result would have had to be evolved from long and

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confused conflicts, and the future would at best have been dark and uncertain. Even in the event of reunion, the fatal principle of secession at will, once recognized, would have passed into the new arrangement.

In view of all this, it seemed good statesmanship to hold the Union together by a compromise, and to adjourn the final and decisive struggle on the slavery question to a time when the Union feeling should be strong and determined enough to maintain the integrity of the Republic, if necessary, by force of arms, and when the free states should be so superior in men and means to the slave-holding section as to make the result certain. [Volume i, page 199.]

This is speculation, but of a kind through which history renders its highest services to the student, the citizen and the statesman.

In spite of his general soundness the writer now and then takes a questionable position. One such is found in the chapter entitled "Secretary of State." After mentioning the negotiations with Great Britain for the surrender of slaves escaping into Canada, Mr. Schurz comments as follows:

> And this happened under the administration of John Quincy Adams; the instructions were signed by Henry Clay, and the proposition was laid before the British government by Albert Gallatin! [Volume i, p. 301.]

Then follows an apology for Clay which confesses that his disposition opposed, while, in general, his conduct favored slavery. For this contradiction, the explanation offered is, the character of the period:

> We can now scarcely appreciate the dread of the consequences of sudden emancipation, the constitutional scruples, the nervous anxiety about the threatened Union, and the vague belief in the efficacy of compromises and palliatives, which animated statesmen of Clay's way of thinking and feeling. [Volume i, page 306.]

It is possible that every element which can properly enter into an explanation of this sort is here present; but I cannot think the emphasis is rightly distributed. I believe that the decisive consideration which moved Adams and Clay, was the sense of public responsibility. The government which they administered was for the whole Union — for the slave- just as much as for the free-labor section. It follows therefore that in the conduct of foreign affairs they had no more right to overlook or neglect the interests of the South than those of the North. To this regard for the obligations imposed by the sense of public responsibility Mr. Schurz gives no place, unless it be through the phrase "constitutional scruples"; but this is manifestly inadequate. The point is the more worthy of note because elsewhere, and particularly in the criticism of the Whig party, this motive, which certainly goes far towards justifying apparently censurable conduct, does not seem to receive due consideration.

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In the chapter entitled "The Exit of President Jackson," it is said, that

> He [President Jackson] had violently interrupted the good constitutional traditions, and had infused into the government and into the whole body politic a spirit of lawlessness which lived after him and of which the demoralizing influence is felt to this day. [Volume ii, pages 109, 110.]

In this view Mr. Schurz has the support of eminent authorities, among others, that of Sumner and von Holst. Still, there is ground for a differing view. There was in Jackson's day a "democratic upheaval" which lifted the masses into power. This movement was a phase of development and therefore of progress. It sought, as does every political revolution, to set aside existing "constitutional traditions" and put in their place a new interpretation of the law, more favorable to the popular aspirations and sense of right. This spirit is not essentially lawless. It rejects what it considers bad law in order to make room for what it considers good law. The first effect of every revolution, the most justifiable not excepted, is demoralization (this even Luther lived to witness and lament); the final effect is to bring law and its interpretation into a truer relationship to the wants of the people, and therefore to create a broader and more durable basis for the development of the law-abiding spirit. If we look at the "democratic upheaval" of Jackson's time in this light, we find ourselves obliged to question the judgment just quoted. The lawlessness was incidental to the movement; it was not of Jackson's creation. His leadership was of that effective kind which secured victory after a comparatively short struggle and thus abridged the period of necessary demoralization. Moreover, in order to be just towards Jackson, it is well to remember that he gained his control over the masses in good part through the very interruption of "the good constitutional traditions" for which he is blamed; and that one use made of this influence was to impress upon his followers that sentiment of devotion to the Union which a generation later contributed, perhaps decisively, to saving the Union.

Turning to the biographical side of the work, one is inclined at first sight to wonder that but twelve out of some eight hundred pages are devoted to the first twenty-one years of Clay's life; but after reading these it would be difficult to point out any important omission. Here as elsewhere the writer has given us only what is really significant. Clay's early education was very imperfect, and he never became in the true sense a student. This fact qualified his success in law and in statesmanship. "He studied only for the occasion, as far as his immediate need went." Cards, company and even his "remarkable gift of speaking" stood in his way.

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These tasks robbed him of the hours and of the temper of mind without which the calm gathering of thought required for the mastery of a science is not possible. Moreover it is not improbable that his remarkable gift of speaking, which enabled him to make little tell for much and to outshine men of vastly greater learning, deceived him as to the necessity for laborious study. [Volume i, pages 23, 24.]

As the biography proceeds, the occasional glimpses which we get of Henry Clay outside of his political life are so attractive, that we are tempted to wish that the requirements of the *American Statesmen* series had permitted more freedom in this direction. The story of Clay's public life is calmly told. Praise and blame are freely bestowed, but always in a judicial tone. Indeed, so severely impartial is the writer that those who have felt the spell of Clay's character and eloquence may think him unsympathetic. In general Clay's spirit is approved. His humanity and chivalry, the ardor, purity and breadth of his patriotism, receive distinct, but by no means extravagant, recognition.

On the other hand the political conduct of Clay is often sharply arraigned. He is blamed for his opposition to Monroe, his management of the bank controversy, his treatment of Harrison, his leadership of the Whigs in Tyler's administration, and some features of his course as presidential candidate. There is almost a suggestion of harshness in the words which follow the commendation of Clay's conduct in 1824: "It would hardly have been predicted then that twenty years later he would lose the presidency by an equivocation." [Volume i, page 230.]

Perhaps the passages which best express the writer's general estimate of Clay's political character and influence are the following:

It [Clay's public career] was ruled by the idea that, as the binding together of the states in the Union and the formation of a constitutional government had been accomplished by the compromising of diverse interests, this Union and this constitutional government had to be maintained in the same way; and that every good citizen should consider it his duty, whenever circumstances required it, to sacrifice something, not only of his material advantages, but even of his sentiments and convictions, for the peace and welfare of the common Republic. . . .

Whether what he advocated was wise or unwise, right or wrong, — there was always ringing through his words a fervid plea for his country, a zealous appeal in behalf of the honor and the future greatness and glory of the Republic, or an anxious warning lest the Union, and with it the greatness and glory of the American people, be put in jeopardy. It was a just judgment which he pronounced upon himself when he wrote: "If any one desires to know the leading and paramount object of my public life, the preservation of this Union will furnish him the key." [Volume ii, pages 413, 414.]

ANSON D. MORSE.

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American Commonwealths. Connecticut. A study of a Commonwealth-Democracy. By ALEXANDER JOHNSTON. Boston and New York, Houghton, Mifflin & Co., 1887. — 12mo, 409 pp.

Realizing the difficulty of treating fully the history of Connecticut in the limited space at his disposal, Professor Johnston has devoted the major part of his book to a study of the growth of democracy in that state, its bearing on the other states, and eventually on the United States. Dealing with the histories of three separate colonies, he traces the success of Connecticut in absorbing its rivals to its being the more democratic, and he makes the bold claim that Hartford is the "birthplace of American democracy" — a statement that will probably be questioned by the Massachusetts historian. But even if the claim be allowed, it was but a seventeenth century democracy. None had the right of suffrage but admitted freemen of a certain property qualification; and Palfrey believed that, even in Plymouth and Connecticut, church membership exercised a controlling, although constitutionally unwarranted, influence. The submission of the minority to the majority was in the early history of the colony almost unknown — secession following defeat.

As a result of the author's plan of treatment, one half of the volume is devoted to the first thirty-five years (1630–1665), while the other half passes rapidly over the next two hundred (1665–1865), involving of necessity many omissions, and wholly inadequate notice, notably, of the Hartford conventions of 1780 and 1815. But the space devoted to the early history has enabled Professor Johnston to give a most accurate and able analysis of the New England "town" system.

In the chapter on the jurisdiction of the territory, Professor Johnston pronounces the title of Warwick mythical, and, as a consequence, his transfer to Say and Sele and others a "mere quit-claim" and "nullity," so that the charter of 1662 was the "first legal title to Connecticut." The Warwick grant does not seem to me quite mythical. Warwick transferred "for . . . considerations" his rights to Say and Sele and others, who it is supposable would have investigated his title, and the publicity given to the transfer would certainly have called forth a protest from the Plymouth company if they had denied his right. Say and Sele and his co-partners certainly believed they had acquired a title; for they commissioned Winthrop and Fenwick to act for them in the territory. Massachusetts in her commission to the settlers acknowledged the rights of the lord proprietors; and Fenwick, in his unauthorized and valueless sale of 1644, plainly shows that he still regards them as proprietors; while the granting of the same territory to Richmond, Carlisle, Gorges and Hamilton by the Council, in 1635, is probably but another example of the ignorance and carelessness in the granting of land which is shown

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in so marked a manner, in the present volume, in the New York, Pennsylvania and Connecticut charters; and this supposition is made stronger by the fact that the latter grants never received the great seal.

There is a noticeable disposition towards special pleading. Whether the question be one that touches the rival colony of New Haven, or the other colonies with which Connecticut came into collision, one feels that the writer is rather a partisan of the state. Thus the *onus* of the first blow at the New England confederation is given to Massachusetts, though in reality Connecticut took the first step in laying an impost, Massachusetts having originally demanded the free navigation of the Connecticut as a condition of union. Again, if it is the historian's pleasure to quote from Washington's order his favorable opinion of the Connecticut brigade, is it not the historian's duty to mention as well Washington's anger at what he termed their "dirty, mercenary spirit"? Nowhere, however, is the tendency of the book more open to exception than in the chapter on the Federal constitution. Professor Johnston claims: (1) that Connecticut was not a "small state"; (2) that her delegates were "quite prepared" to have at least a part of the new government chosen by the people; (3) that Franklin's influence was cast for the "Connecticut proposal"; and (4) that it was from the Connecticut delegation that we obtained our present system of representation. Yet Connecticut, both by her votes and actions, placed herself with the small states. Far from being prepared to give proportional representation in a part of the legislature, one of her delegates openly spoke against the two branches and demanded that "the people should have as little to do as may be about the government"; and her uniting with the other states on the "New Jersey plan" certainly showed that she desired to continue the system of the Articles of Confederation. Franklin strongly opposed the Connecticut proposal, and only yielded his vote when it became evident that without a compromise union was impossible. To refer our present system to Connecticut is manifestly wrong. It was the result of a compromise between the large and the small states, the large states yielding their consent because they knew that either the convention would break up or the arrival of the New Hampshire delegation would give the small states a possible majority. According to Madison, Sherman's motion of June 11th, on which Professor Johnston bases his claim, was virtually anticipated by Dickinson's of the 7th.

PAUL LEICESTER FORD.

The American Electoral System. By CHARLES A. O'NEIL, LL.B. New York, G. P. Putnam's Sons, 1887.—284 pp.

Mr. O'Neil has undertaken in this work "to trace step by step, year by year, the growth and establishment of fixed principles of law, apper-

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taining to the great central office in our Federal government, and especially to point out prominently, by the light of the past, the snags and pitfalls which lie in the path to the White House." This task is assumed to the end that the American public may the more clearly appreciate the sources and nature of the dangers which permanently impend in connection with the electoral system. It seems likely that the book was written prior to the last session of Congress; for the bills passed by that body obviate evils which the author has devoted much time to decrying. His notice of the contents of these new laws is rather unsatisfactory, though the main features are stated. After some two hundred pages thickly strewn with illustrations of the uncertainty lurking in the expression "and the votes shall then be counted," it is disappointing to be informed that Congress has by legislation removed the uncertainty, without any information as to how the removal was effected. The insertion of the law in the appendix hardly seems to compensate for the absence of some expository comment.

As to the origin and history of the constitutional scheme of Presidential elections, Mr. O'Neil's book contains a conscientious and impartial view of the whole subject. He is especially successful in tracing the influences which converted the indirect method of election designed by the framers into the popular system that displaced it. The supports of the original system were dissolved in the intense heat of early Federal-Republican politics. As soon as parties became clearly defined, the labor of the leaders in controlling the actions of the scattered electoral bodies became too complicated, and the simpler constraint of a moral bond soon became recognized as defining the duties of the electors.

Besides the more familiar points that were involved in the controversy of 1876–7, Mr. O'Neil throws much light on less prominent but possibly quite as important questions that have not been so generally discussed. The substitution of the general ticket in place of the district method of choosing the electors, for instance, is lucidly explained. Mr. O'Neil in this case casts off the purely objective role which he elsewhere assumes, and becomes an advocate of the district system.

Another question well treated is that of the constitutionality of the appointment of electors by the state legislatures. The constitution decrees that "the state shall appoint, in such manner as the legislature may direct." There is room for much debate as to the interpretation of this expression. What is meant by the "state"? How much discretion is involved in the word "manner"? Does "legislature" mean only the two houses of elected representatives, or must it include the whole of the law-making body, *i.e.* legislature and governor? Mr. O'Neil has collected in his book the substance of all that has been said

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and all that has been done in connection with these and many similar questions in our hundred years of constitutional life. The average citizen will find in the work some very surprising commentaries on the assumed certainty of our constitution at law.

WM. A. DUNNING.

The Fishery Question: its Origin, History and Present Situation. With map and bibliography. By CHARLES ISHAM. New York, G. P. Putnam's Sons, 1887. — 89 pp.

The Fisheries Dispute: A Suggestion for its Adjustment. By Hon. JOHN JAY, late Minister to Vienna. Second edition. New York, Dodd, Mead & Company, 1887. — 52 pp.

Mr. Isham's *Fishery Question* forms number 41 of Messrs. Putnams' *Questions of the Day* series; and according to the preface, the greater part of the work was done for the United States history seminar in the graduate department of Harvard university.

The author begins with the earliest historical mention of French, Portuguese, Spanish and English fishermen visiting the coasts of North America. Passing over the Spanish and Portuguese expeditions as unimportant, he relates in a rather confusing manner the explorations and settlements of the French and English and the hostilities of the rival colonists down to the treaty of Paris (1763), when France ceded her Canadian possessions to England.

The importance of the fisheries became evident at the end of the Revolutionary war in the negotiations for a definite treaty of peace between the United States and Great Britain. Although, according to Mr. Isham, the American commissioners did not make the concession of the ancient rights of American fishermen an *ultimatum*, yet they insisted so strenuously upon them that the English commissioners felt compelled to yield the point. (Article iii of the treaty of 1783.) After the war of 1812, the English government asserted that by that war the fisheries article of the treaty of 1783 was *ipso facto* abrogated. The dispute upon this point was terminated by the treaty of 1818, which definitely admitted our ancient fisheries in certain localities as before, while we renounced our rights to fish within three miles of the shore in other localities. A new dispute arose in 1843 over the right of our vessels to pass through the strait of Canso. After referring to this discussion and the seizure of the *Washington* the author passes to the treaty of reciprocity of 1854. By this treaty Canadian natural products were admitted into the United States free of duty, and fishing rights analogous to those of 1783 were granted to the citizens of the United

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States. This treaty, which was far more advantageous to Canada than to the United States, terminated in 1866. The next year the provinces of Canada were united into the Dominion of Canada, and the fisheries were made a department of state under a cabinet minister. In 1868 and in 1870, under the guise of interpreting the treaty of 1818, the Dominion passed measures oppressive to our fishermen, and boarded over 400 vessels for alleged transgression of the three mile limit, 15 of which were condemned. The United States offered $1,000,000 for the inshore fisheries simply to get rid of these annoyances. Negotiations ensued, and, as Mr. Isham says, on page 61: "Finally it was decided to admit the United States to the fishery in consideration of the remission of the duty on Canadian fish and fish oil, and the appointment of arbitrators to assess the value, if any, of the British concession in excess of the American, which included a free fishery on the United States coasts, north of the thirty-ninth degree of north latitude." The commission fixed the award at $5,500,000, — a sum which was generally regarded as exorbitant. This award was paid by the United States, and the new treaty went into effect in 1873, to last ten years, and then to be terminable by either party on two years' notice. This treaty, like the one of 1854, was far more beneficial to Canada than to the United States, and it was promptly terminated on notice, July 1, 1885. This happened in the midst of the fishing season, and a temporary arrangement was made for the rest of the year. The season of 1886 opened with both governments resting on the treaty of 1818; and again the Dominion passed extremely oppressive regulations, under which several fishing vessels were seized. A few were fined, and one was condemned. In every case Secretary Bayard duly protested and the whole subject is still under diplomatic discussion.

After this *résumé* of the history of the question, Mr. Isham discusses the retaliatory measures of Congress, by which the President is empowered to deny to vessels of the British dominions of North America entrance into the waters of the United States. The author favors an international commission to adjust the whole matter.

In the so-called "bibliography" of the subject, at the end of the book, the author cites upwards of one hundred different authorities. It would be a mistake to suppose that any considerable number of these books bear directly on the subject. What is given is a tolerably full bibliography of Canadian history, and many of the books referred to are cited to substantiate indisputable and well-known facts; and as volume and page are usually omitted, the entire apparatus is almost useless. For example, on page 52, Mr. Isham cites an authority for the statement, "The strait of Canso separates Nova Scotia from Cape Breton." Should the reader desire to consult this authority (instead of examining a map),

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he could not readily do so, as no page is given, but simply the citation, "Martin's *Nova Scotia and Cape Breton*."

Mr. Jay's pamphlet on the *The Fisheries Dispute* is written in the form of a letter to Senator Evarts. After emphasizing the importance of speedily settling the dispute, the author discusses retaliation as a remedy and pronounces it incomplete. He then points out that British misconstruction of the treaty of 1818 is at the bottom of the difficulty, and discusses negotiation, as a remedy proposed by Lord Roseberry, and arbitration, the proposition of the official organ of the Dominion of Canada. Mr. Jay thinks either would be preferable to retaliation; "but without an admitted basis of principle and right distinctly formulated, as were the three rules laid down for the Geneva arbitration, and to which Great Britain wisely gave her adhesion, it would seem idle to expect a satisfactory measure of justice either from negotiation or arbitration. Our recent negotiations have only served to make more clear the fact that the two governments look at the rights of our fishermen from different standpoints."

Mr. Jay's "suggestion" is that the United States abrogate the treaty of 1818. He considers that the conduct of the local Canadian authorities amounts to a violation of that treaty, and that its violation by the other party justifies us in abrogating it. He cites by way of precedent the act of Congress of July 1, 1798, annulling our treaties of 1778 with France on the ground that France had repeatedly violated the same. Having abrogated the convention of 1818, we shall rest, Mr. Jay holds, on the rights and privileges defined in the treaty of 1783.

To substantiate this position, he reviews the historical and diplomatic development of the whole question, touching on the French and English wars and on the treaties of Breda (1667), St. Germain (1683), London (1686), Ryswick (1697), Utrecht (1713), Aix-la-Chapelle (1748), and Paris (1763), when all Canada was formally ceded to Great Britain, France reserving only the right of fishing and drying on the coasts of Newfoundland. Referring to the interest of the United States in the fisheries after the Revolutionary war, Mr. Jay says, on page 24: "The historic and memorable part borne by the American colonists in securing for Great Britain the Newfoundland fisheries, added to their importance to the colonies themselves, naturally led to a just appreciation of their value." He then shows from the Secret Journal of Congress that the old Congress took steps to secure these common rights of the states to the fisheries in the treaty of peace of 1783; and he also shows from recent publications of confidential correspondence of the Count de Vergennes, and the life of Lord Shelburne, that Great Britain, France and Spain were in opposition to the American claims to the fisheries. He then gives a very lucid and interesting account of

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the negotiations of the American and British commissioners, in which he plainly shows that the Americans practically made the fishery rights an *ultimatum* and that the Englishmen so understood it. Consequently the third article of the treaty of peace of 1783 acknowledges the ancient fishery rights of the American states. This acknowledgment, according to our author, was no mere grant of a franchise, but a division or partition of empire. If this be true, it cannot be maintained that the war of 1812 abrogated *ipso facto* our fishery rights, nor was this contention of the British government ever admitted by the United States. The question was laid at rest by the treaty of 1818, upon which our fishery rights now rest; but if we now annul the treaty of 1818, our position and our rights are the same as before its conclusion. If the treaty of 1783 was not abrogated by the war of 1812, — and Mr. Jay makes a strong case for the opposite theory, — then the abrogation of the treaty of 1818 will cause the treaty of 1783 to revive in precisely the same manner as the treaty of 1818 revived after the expiration of the Reciprocity treaty of 1854 in 1866, and of the treaty of 1871 in 1885.

The pamphlet is worthy of the author, and sustains his reputation as a diplomat and a publicist.

THOMAS D. RAMBAUT.

Elements of Right and of the Law. By GEORGE H. SMITH. Second Edition. Chicago, Callaghan and Co., 1887. — 12mo, 398 pp.

The Science of Law, according to the American Theory of Government. By E. L. CAMPBELL, counsellor-at-law. Trenton, 1886. — 8vo, 113 pp.

These two works — Mr. Smith's book and Mr. Campbell's pamphlet — claim notice, less because of their value as contributions to juristic science, than because of their character and tendency. It is encouraging to find that there are lawyers in the United States who think it worth while to examine the fundamental principles of legal philosophy; and it is an interesting fact that both authors represent an energetic reaction against the theories of the dominant English school, and a reassertion of the "natural right" doctrine.

Mr. Smith divides his treatise into three parts, or books. Book i treats of the "Elements of Right"; book ii, of the "Elements of Law"; and book iii is entitled "Historical and Critical Review of the several Theories of Jurisprudence," — but is, in fact, a review of certain theories only, which appear to the author of prime importance. The first and second of these divisions, as their titles imply, present the author's system of jurisprudence, or at least the outline of such a system. This portion of the book contains much good reasoning, and many keen

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and true distinctions; but its value is greatly lessened by the author's adherence to an artificial and antiquated classification — none the less antiquated, from a scientific point of view, because found in recent English works. The system is one of rights, not of legal relations; and all rights are grouped into the two mediæval (not Roman) classes of rights *in rem* and rights *in personam*. This division leads to the customary absurdities. The rights which flow from family relations are classed as rights *in rem* (§ 16), — which they doubtless were in primitive society, when the head of the house *owned* wife and children, but which they are not at the present day. Of course the right to the custody of a child still expresses itself in an action which runs against third parties, and which therefore may be termed an action *in rem;* but the legal relation between father and child, like all the other family relations, is now a complex of reciprocal rights *in personam* — a fact which the author elsewhere recognizes (§ 467).

The classification adopted also results in the close association of obligations created by contract with those generated by tort (book i, chapter viii). This is Roman, but nevertheless unnatural. In a proper system of legal relations, obligations created by tort naturally fall into a separate division of the law. They belong in the field of *private* law, because private law includes all relations between individuals; but they border closely upon criminal law, which is a portion of *public* law, because the action of tort is not limited to the redress of the private injury. The individual who brings an action of tort for actual damages, brings an essentially private action; but when he sues for vindictive damages, he becomes in a peculiar sense a representative and agent of the whole community — a vindicator of the entire social order. Whether a delict shall beget a criminal action or an action for penalty, or both, is a question of social expediency pure and simple; and in the history of every system of law we therefore find crimes and torts divided by a shifting line. These facts the author entirely ignores, treating the action of tort as a suit for the recovery of actual damages only.

On the other hand, this theory of the obligation *ex delicto*, combined with an extremely peculiar construction of the obligation *ex contractu*, enables Mr. Smith to produce an apparent generic resemblance between the two. Contract, according to him, does not give the promisee any right to demand performance. The promisor is under a "duty" to perform, but there is no "obligation." Obligation is created only by some loss or "detriment" upon the part of the promisee, suffered by him in consideration of the promise. That is, "detriment" is not merely an essential element in the creation of obligation, but the very ground and cause of obligation; and it should therefore be the *measure* of obligation.

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This construction obviously gives an excellent basis for the English doctrine of "consideration"; but it does not explain, on its face at least, why courts of equity enforce specific performance, or why damages, in action on breach of contract, are based on the value of the performance. According to the author's theory, there should be no action except for recovery of consideration. He bridges this difficulty by asserting that it is the *value* of the consideration which is in question, *i.e.* "its value or utility *to the obligee*," and that, "as a practical rule, it is reasonable to assume, unless the contrary clearly appears, that the value of the consideration to the obligee is as agreed upon by him" (§ 188). This seems to me both lame and inadequate; and it requires no little ingenuity on the part of the author to bring the positive rules of English law under the cover of this theory. (See §§ 190 *et seq.*) As to the "civil" law, the author boldly asserts that its doctrine is identical with his, but remains in default with the proof of this startling thesis. In point of fact, whether civil law means classical Roman law or Justinian law or modern continental European law, its principles are diametrically opposed to Mr. Smith's. It is the accepted promise, the agreement, which creates obligation at civil law; consideration, in the English sense, is not necessary; the gratuitous promise, if accepted, is, in the absence of positive statutory restrictions, actionable; specific performance is enforced when practicable; and damages for breach of contract include not only positive detriment (*damnum emergens*), but failure to gain (*lucrum cessans*). A possible explanation of Mr. Smith's error is afforded on page 124 (§ 184), where he speaks of the "cause" of contract, in the civil law, as identical with the English consideration. This, of course, is all wrong. If A agrees to give B a hundred dollars gratuitously, *i.e.* without consideration, the agreement is not *sine causa*, but *causa donandi*. "Cause" is not consideration, but motive.

Passing without further comment from the author's systematic jurisprudence to the philosophical side of his work, we find him an outspoken and energetic defender of "natural right," and a vehement renouncer of Bentham and Austin and all their works. The state does not create rights, it merely formulates and enforces them. If the state gives the individual a "power" or "liberty" which rests upon no basis of justice, there is only a "*quasi*" or "*pseudo*" right. To speak of a legal as distinguished from a moral right is simply a perversion of the word "right" from its natural meaning. (See especially book iii, chapter iv.) So far, this is a harmless bit of logomachy; but the author has the courage of his convictions, and draws an exceedingly practical inference. If an act of the legislature is contrary to right and reason, the courts, in his opinion, are bound to declare it void, — and this

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although the legislature has infringed no express constitutional provision (§ 270). If this be true, certain questions commonly assigned to the domain of pure ethics are obviously legal questions of the first importance. How do we find this "right" that overrides statutes? Who declares and interprets it? In the section last cited, this function seems to be assigned to the courts; but in other passages, Mr. Smith recognizes that the courts, like the legislature, may, and sometimes do, misinterpret the "right." Its authentic and final interpretation, accordingly, must be sought elsewhere.

The author's theory on this point is most fully set forth in book i, chapter iv. The individual, he declares, intuitively knows right from wrong, and the individual intuitions agree in the main. But they do not agree in details, and "as no reason can be given why one man's conscience should be forced upon another, it follows that, in all questions between men, we must resort to the common conscience as the practical test of right and wrong" (§ 56). Here we seem to reach relatively firm ground — although we are not yet informed how this common conscience becomes legally cognizable, otherwise than in usages, constitutions and statutes, judicial decisions, *etc.*, nor how its commands are to be enforced, otherwise than through the machinery of the state. But the author does not rest here. "In view of the difference in morality of different peoples and ages, and of different classes of individuals in the same age and country, it is evident that positive morality cannot be accepted as infallible. Hence the ultimate standard of right is to be sought in reason, or scientific morality" (§ 53). But only two pages farther on, Mr. Smith plunges us into a bottomless gulf of uncertainty by admitting that "the first principles" of scientific morality are "assumed," and that "it cannot, in the present stage of its development, assert the absolute truth of its conclusions" (§ 56).

It is singular that the author does not see that his "scientific morality," "in its present stage of development," with its "assumed" first principles, is purely an individual intuition, — and that no reason can be given why one man's intuition should be forced upon another. I, for one, intuitively reject certain of his intuitions. I cannot see, for example, why the "obligation" of contract should be radically different from the "duty," and I reject this distinction of his as extremely immoral.

Mr. Campbell's *Science of Law* may be dismissed very briefly. The pamphlet is but the "preliminary chapter" of a projected work on jurisprudence; and this preliminary chapter deals almost exclusively with the philosophy of law. Mr. Campbell's legal philosophy is practically the same as Mr. Smith's. He, too, bases all law upon natural right; and with him, too, the cognition of right is intuitive. He denies

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the omnipotence of the state, and is even more vehement than Mr. Smith in his denunciation of the utilitarian theory. But he is also much cruder; and one striking evidence of his crudity is contained in the title of his work. He declares his theory to be "the American theory"; and this he seeks to substantiate by quotations from the Declaration of Independence and from our national and state constitutions. But the theory is, or rather was, just as truly English in the seventeenth century and French in the eighteenth, as it was or is American. It is the revolutionary theory; and it has become imbedded in our political and legal speech because our national life began with a revolution against constituted authority.

That both these authors attack the dominant English theory as to the source of legal right, is, as I have already said, an interesting fact. As formulated by Bentham and Austin, the theory invites attack. It is true that the state makes the law; but the *state* must be sharply distinguished from the *government*, and this the dominant English jurisprudence does not always do. Nor, in truth, are the assailants of Bentham's doctrine clearly conscious of this distinction; but, as the brunt of their attack is really directed against the assumption that the *government* makes the law, and as they have little difficulty in showing the inadequacy of this theory, they compel the defenders of the dominant doctrine to reformulate their thesis and to define the word *state*. It would be better, because of the ambiguity of this word, to use the word *sovereign*. Sovereignty *may* reside in the government, or in one of its departments; but it may reside elsewhere. In our system, for example, the sovereign is not, as Mr. Smith seems to think (§ 531), the national and state governments with their various departments: it is the amending power. It would be interesting to know whether Mr. Smith desires to invest any individual or body of individuals in this country with the power to declare a constitutional amendment void, as contrary to "right."

But while it is true that the state, *i.e.*, the sovereign, creates rights, and that there are to-day no rights other than those recognized by the state, it is also true that the state ought to be the faithful interpreter of the social sense of right and equity. The emphasis which the English school places upon the first of these truths tends to obscure the second. The sense of equity is law "in the making," and it is the duty of the jurist as well as of the moralist to see that the development of law shall not lag too far behind the developing sense of equity. If books like Mr. Smith's and Mr. Campbell's operate to quicken the general recognition of this duty, they are not written in vain.

MUNROE SMITH.

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